

# LAWFUL WORK WHILE UNDOCUMENTED: BUSINESS ENTITY SOLUTIONS

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*Immigration law and business-associations law rarely enter the same conversation. This Article argues, however, that business entity formation—such as the use of limited liability companies—has the potential to not only expand opportunities for undocumented migrants but also to significantly benefit the U.S. economy. As such, this Article seeks to make a round of introductions: introducing immigration scholars and lawyers to concepts of business entity formation that can radically change the lives of undocumented persons in the United States and introducing corporate scholars and lawyers to the ways in which their work can intersect with immigration law to effect social and economic change.*

*An estimated eight million undocumented migrants work in the United States despite the fact that, since 1986, federal law has penalized employers for hiring workers who lack work authorization. Some migrants engage in work not covered by the law—itinerant domestic help and, in certain cases, independent contract work. Others work for employers who are undeterred by the civil and criminal penalties for hiring undocumented workers. In each of these scenarios, undocumented workers frequently encounter low wages and hazardous work conditions.*

*This Article considers alternative work options for undocumented migrants beyond itinerant domestic labor, independent contracting, and working for employers who are acting contrary to law. It examines how forming business entities, such as a limited liability company, can broaden opportunities for undocumented workers—from unskilled laborers to highly skilled professionals. Business entities can have traditional benefits, such as limited liability. But business entities can also offer lesser-known benefits to undocumented owners, including providing a means of working around barriers created by unauthorized-employment laws, and enabling the creation of “mixed-status businesses” where unauthorized and authorized workers can lawfully work side by side. This Article concludes that the skillful use*

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*of business entities by undocumented persons has the potential to greatly benefit those individuals as well as the U.S. economy as a whole.*

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## INTRODUCTION

There are an estimated 10.5 million migrants living in the United States without legal status.<sup>1</sup> Approximately 8 million of those individuals work in the

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1. See Elain Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United State and Who Are They?*, BROOKINGS INST. (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/> [<https://perma.cc/3JH8-7RJ3>].

United States without any legal authorization to do so.<sup>2</sup> They make up roughly 5% of the U.S. workforce.<sup>3</sup>

Although it may come as a surprise to those unfamiliar with immigration law, it is not a crime to work in the United States without authorization.<sup>4</sup> It is not even a civil offense.<sup>5</sup> And insofar as that goes, undocumented workers can rest easy about their choice to engage in work. On the other hand, undocumented workers, like all other undocumented persons, live under constant threat of civil deportation. This fear follows undocumented workers in and out of the workplace. Unfortunately, employers frequently exploit this fear to their advantage and to the workers' detriment.<sup>6</sup>

For employers, there are substantial incentives to hire undocumented workers. Employers are incentivized by the fact that such workers will frequently accept lower compensation than U.S. citizens and will work under more questionable conditions—ranging from lack of safety equipment to long hours.<sup>7</sup> But these arrangements come with risk for employers. It is unlawful to employ a noncitizen who lacks work authorization, and employers face both civil and criminal penalties for hiring undocumented workers.

What if there were a way for undocumented migrants to work in the United States without triggering the penalties against employers for hiring them? As it turns

2. See, e.g., Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> [https://perma.cc/N966-CYVW]. Notably, though beyond the scope of this Article, an individual may be legally present in the United States but not authorized to work. For example, lawfully admitted tourists with a B2 visa are individuals who are allowed to be in the United States but who are not allowed to work. See IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1049 (16th ed. 2018) (noting employment of tourists is not permitted); see also BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISITOR VISA, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> [https://perma.cc/EQ2K-PYWR].

3. Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigration Workforce Is Smaller, but with More Women*, PEW RSCH. CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/undocumented-immigrant-workforce-is-smaller-but-with-more-women/> [https://perma.cc/2RYC-ZGJJ] (“Unauthorized immigrants were 4.8% of the nation's workforce in 2016, a dip from their peak of 5.4% in 2007.”).

4. *Arizona v. United States*, 567 U.S. 387, 404 (2012) (noting that federal law does not impose criminal sanctions on noncitizens “who seek or engage in unauthorized work”).

5. Here I use the phrase “civil offense” in the sense of a law that imposes financial penalties on an offender. See, e.g., Noah A. Messing, *New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 661–62 (2016) (defining civil offenses as laws that penalize offenders through fines or forfeit property in an effort to punish and deter conduct). As discussed in Part IV, there are immigration consequences to unauthorized work, including hurdles to adjustment of status; moreover, it is a crime for unauthorized workers to obtain employment through fraudulent means. See *Arizona*, 567 U.S. at 404–05.

6. See *infra* Section II.D (discussing ways in which employers exploit undocumented workers).

7. See *infra* Section II.D (discussing employer incentives for hiring undocumented workers).

out, there is such a way. If an undocumented migrant becomes a member–manager of a limited liability company (“LLC”), the LLC can benefit from the migrant’s work without being labeled the migrant’s employer. Moreover, third parties can hire the LLC and reap the benefit of the migrant’s work without becoming the migrant’s employer. In this way, LLC formation is a business entity solution that allows migrants to engage in work while undocumented without triggering legal liability.

Evidence suggests that there may be untapped interest in business formation among undocumented migrants. Migrants with legal status—those with visas granting them permission to live and work in the United States—are nearly twice as likely as U.S.-born individuals to start their own businesses.<sup>8</sup> Refugees start new businesses at an even higher rate than other lawful immigrants: 13% of refugees and 11.5% of nonrefugee immigrants are business owners.<sup>9</sup> In contrast, just under 8% of undocumented migrants are entrepreneurs.<sup>10</sup> These figures suggest that there is potential to grow undocumented business ownership, especially when, as this Article will show, business ownership can also create lawful work opportunities for undocumented owners.

This Article comprehensively explores a business entity solution to the problems faced by undocumented individuals seeking work opportunities. Many legal scholars have previously considered the law regarding the employment of undocumented migrants,<sup>11</sup> and there is a large literature on the benefits and

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8. Dan Kosten, *Immigrants as Economic Contributors: Immigrant Entrepreneurs*, NAT’L IMMIGR. F. (July 11, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-entrepreneurs/> [<https://perma.cc/E5A7-U9Y9>] (“The percentage of adults, both U.S.-born and immigrant, who became entrepreneurs in any given month during 2016, was .31 percent, or 310 out of every 100,000. The entrepreneurship rate for immigrants during the same time period was higher at .52 percent, about twice the rate of the U.S.-born (.26 percent).”); *see also* RICHARD T. HERMAN & ROBERT L. SMITH, IMMIGRANT, INC.: WHY IMMIGRANT ENTREPRENEURS ARE DRIVING THE NEW ECONOMY (AND HOW THEY WILL SAVE THE AMERICAN WORKER) xvii (2010).

9. Kosten, *supra* note 8.

10. *Undocumented Immigrants, Immigrants and the Economy in: United States of America*, NEW AM. ECON., <https://www.newamericaneconomy.org/locations/national/#undocumented-immigrants> [<https://perma.cc/979X-94LF>]. Prior to this study by New American Economy, the only information available regarding undocumented entrepreneurship came from the late Professor Harry Pachon, who estimated that 8–10% of undocumented migrants owned their own businesses. Duarte Geraldino, *Undocumented Entrepreneurs: No Social Security Number, Owning a Business*, AL JAZEERA (Mar. 27, 2014), <http://america.aljazeera.com/watch/shows/real-money-with-alivelshi/articles/2014/3/27/undocumented-entrepreneursnosocialsecuritynumberowningabusiness.html> [<https://perma.cc/4P37-UTRT>].

11. *See, e.g.*, Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505 (2015) (exploring the history of federal employer sanctions and state laws criminalizing unauthorized work); David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77 (2010) (evaluating different approaches to sanctions for employers who hire those without work authorization and noting that in all cases the employees bear the brunt of enforcement efforts); Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 6 GEO. IMMIGR. L.J. 343 (1994) (examining the results of IRCA, concluding it did not reduce

drawbacks of different business entities.<sup>12</sup> Only a few scholars, however, have worked on the intersection of the two—the connection between immigration law and business entity formation.<sup>13</sup> There has not been a comprehensive look at the potential use of business entities as a mechanism to create lawful work opportunities for noncitizens without work authorization. Thus, this Article seeks to make a contribution to the literature by providing a big-picture view of these issues and their ramifications. This account should be of service to scholars and practitioners alike. In addition, this Article seeks to contribute to two scholarly conversations being had by two sets of scholars and to bring them into productive contact—that is, the conversation about business entities had by business-law scholars and the conversation about immigrant labor had by immigration-law scholars.

Part I of this Article provides background on the prohibition of employing noncitizens without work authorization. Part II discusses the most common options for unauthorized workers, including intermittent day labor for homes and independent contracting. This Part also discusses the most likely employment solution for an undocumented person: working for an employer who is unafraid of the legal liabilities flowing from hiring a noncitizen without work authorization. Part III discusses better options for undocumented workers made possible by business entity formation, including partnerships, corporations, and, most promising, LLCs. Part IV discusses the potential for business entity strategies to significantly benefit not just noncitizens but the U.S. economy as a whole.

### **I. EMPLOYER PENALTIES FOR UNAUTHORIZED EMPLOYMENT**

This Part outlines the law that regulates the employment of undocumented workers. It explains what conduct is prohibited and what penalties can accompany violations of the law. It also explores the historical development of the law regarding the employment of undocumented workers.

There is a commonly held misconception that it is a crime to be present in the United States without authorization.<sup>14</sup> This is, however, not true.<sup>15</sup> Despite ubiquitous use of the phrase “illegal alien” to describe a noncitizen present in the

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or eliminate undocumented migration but did create new forms of discrimination); *see also* Heeren, *infra* note 33; Wishnie, *infra* note 34; Lee, *infra* note 112; Lee, *infra* note 130.

12. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79 (2001); Hendry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44 (1992); Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387 (1991).

13. *See, e.g.*, Amarante, *infra* note 211; Amarante, *infra* note 220; Cummings, *infra* note 232; Mastman, *infra* note 178.

14. Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL. INTERDISC. L.J. 589, 604 (2019).

15. *Id.*

United States without authorization, presence is not a criminally punishable offense.<sup>16</sup>

There is a natural corollary that is also a misconception—that noncitizens present in the United States “illegally” must be engaged in unlawful conduct if they work without authorization.<sup>17</sup> To the contrary, it is not a crime to work in the United States without authorization.<sup>18</sup> The potential for criminal liability is on the other side of the transaction: with the employer. Pursuant to the Immigration Reform and Control Act of 1986 (“IRCA,” commonly pronounced “irk-uh”), it is “unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”<sup>19</sup>

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16. *Id.* The primary consequence that undocumented migrants face for their unauthorized presence in the United States is civil deportation, not criminal punishment. *Id.* That said, it is a crime to cross the U.S. border into this country without authorization, although doing so is most frequently charged as a misdemeanor. *Id.* at 605 & n.102 (citing 8 U.S.C. §§ 1325 (unauthorized entry), 1326 (unauthorized reentry after removal)). But in any other context we tend not to refer to people who have committed a singular crime as being “illegal” and certainly not indefinitely. *Id.* at 605. Moreover, the majority of noncitizens living in the U.S. without authorization initially arrived in this country with permission but overstayed their authorized stay, making them ineligible for this form of criminal punishment. *Id.*

17. *See, e.g.,* Jordan, *supra* note 2 (“working illegally”). Notably, U.S. Supreme Court Justice Samuel Alito reflected this misconception during oral argument in the lawsuit concerning the expansion of the Obama Administration’s Deferred Action of Childhood Arrivals (DACA) program and implementation of its Deferred Action for Parents of Americans (DAPA) program, when he asked: “How can it be lawful to work here but not lawful to be here?” Transcript of Oral Argument at 28, *United States v. Texas*, 137 S. Ct. 285 (2016) (No. 15-674).

18. *See, e.g.,* *Arizona v. United States*, 567 U.S. 387, 404 (2012) (noting that the United States’ “comprehensive framework” regarding employer sanctions “does not impose federal criminal sanctions on the employee side (i.e., penalties on aliens who seek or engage in unauthorized work)”). That said, if an employer does things right, the employee should complete an I-9 form within three days of starting work. 8 C.F.R. § 274a.2(b)(1)(ii)(B) (2020) (requiring completion of I-9 form within “three business days of the hire”). The employee must, on this form, attest under penalty of perjury that they have authorization to work in the United States. 8 U.S.C. § 1324a(b)(2). Beyond perjury, other criminal penalties can flow if an employee produces false documents in an effort to gain employment. *See, e.g.,* 18 U.S.C. § 1546(b) (setting criminal penalties for using a false document or making a fake attestation in seeking employment); *see also* Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History: A Personal Account*, N.Y. TIMES (June 13, 2008), <https://cdn1.nyt.com/images/2008/07/14/opinion/14ed-camayd.pdf> [<https://perma.cc/YX6D-KTXX>] (discussing the plea bargains entered into by undocumented workers criminally charged with aggravated identity theft and Social Security fraud).

19. 8 U.S.C. § 1324a(a)(2). The law penalizes the employment of individuals who lack work authorization. Commonly, such workers are undocumented, meaning they lack authorization to be present in the United States. The law, however, extends beyond this group to prohibit the employment of migrants who, while lawfully present in the United States, hold an immigration status that prohibits their employment. H.R. REP. NO. 99-682, pt. 1, at 46 (1986); *see also* KURZBAN, *supra* note 2, at 1049 (noting that “employment is not permitted” of lawful nonimmigrants present on a B-2 visa); *id.* at 1056 (noting international students

In addition, should an employer find out that an employee “is (or has become) an unauthorized alien with respect to such employment,” it is unlawful to continue their employment.<sup>20</sup>

Notably, an employer cannot avoid these prohibitions with obvious work-arounds such as a contracting or subcontracting relationship.<sup>21</sup> If a “person or other entity” manages to “obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor,” that person or entity will be “consider[ed] to have hired the alien for employment” in violation of IRCA.<sup>22</sup> Walmart famously fell afoul of this provision, ultimately paying \$11 million to settle accusations that the company benefitted from janitorial-service contractors who employed undocumented laborers to undertake overnight cleaning in stores across several states.<sup>23</sup>

Knowledge is an important part of these IRCA provisions.<sup>24</sup> “Knowing” is defined by regulation.<sup>25</sup> It includes actual knowledge.<sup>26</sup> It also includes constructive knowledge: “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”<sup>27</sup>

Employers face federal civil and criminal penalties for violating IRCA. On the civil side, employers as individuals or entities can be ordered to pay fines that escalate for repeat offenders.<sup>28</sup> Fines start at \$583 and are capped at \$23,331 per

present on an F-1 visa cannot be employed during their first academic year of schooling “except for on-campus work”). This Article focuses exclusively on the first category of noncitizens without work authorization: those without legal authority to be present in the United States, although the analysis herein would be applicable to both groups.

20. 8 U.S.C. § 1324a(a)(2).

21. 8 U.S.C. § 1324a(a)(4) (“[A] person or other entity who uses a contract, subcontract, or exchange . . .”).

22. *Id.*

23. Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million on Lawsuit on Illegal Workers*, N.Y. TIMES (Mar. 19, 2005), <https://www.nytimes.com/2005/03/19/business/walmart-to-pay-us-11-million-in-lawsuit-on-illegal-workers.html> [<https://perma.cc/2TRH-4QEV>].

24. 8 U.S.C. § 1324a(a)(1)(A) (“[K]nowing the alien is an unauthorized alien . . . with respect to such employment”); *id.* § 1324a(a)(2) (“[K]nowing the alien is (or has become) an unauthorized alien with respect to such employment”); *id.* § 1324a(a)(4) (“[K]nowing the alien is an unauthorized alien . . . with respect to such employment”).

25. 8 C.F.R. § 274a.5 (2021).

26. *Id.*

27. *Id.* The regulations include three nonexhaustive examples of constructive knowledge. First, failure to complete the I-9, which is designed to verify employment eligibility. *See supra* note 18 (discussing I-9 requirements). Second, having access to documents that indicate the noncitizen is ineligible to work. Third, acting “with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the work force or to act on its behalf.”

28. 8 U.S.C. § 1324a(e)(4).

undocumented worker.<sup>29</sup> On the criminal side, individuals or entities engaged in a “pattern or practice” of employing undocumented workers face mandatory fines—\$3,000 per undocumented worker—six months of imprisonment, or both.<sup>30</sup> If an employer knowingly hires 10 or more undocumented workers during any 12-month period, the potential jailtime increases to five years.<sup>31</sup>

Federal penalties for unauthorized work are fairly new—at least in the long history of immigration law. Congress had started considering the possibility of employer sanctions in 1952, but those efforts went nowhere until 1986.<sup>32</sup> For 210 years of the United States’ existence prior to passage of IRCA, such employment was generally lawful.<sup>33</sup>

What, then, accounts for the radical reshaping of U.S. law in 1986? For one, IRCA was greatly influenced by the work of the Select Commission on Immigration and Refugee Policy (“SCIRP”).<sup>34</sup> SCIRP was created in 1978 to study then-existing immigration law and its effects on the United States as well as to recommend changes to governing law.<sup>35</sup> After reviewing testimony and expert research, the Commission released a final report on March 1, 1981.<sup>36</sup> In that report,

29. Civil Monetary Penalties Inflation Adjustment, 85 Fed. Reg. 119, 37,004, 37,009 (June 19, 2020) (adjusting upward the statutorily set fines—a minimum of \$250 and a maximum of \$10,000—for inflation).

30. 8 U.S.C. § 1324a(f)(1).

31. *Id.* § 1324(a)(3)(A). Additional criminal consequences abound if an employer unlawfully brings migrants into the United States, transports undocumented migrants, harbors undocumented migrants, or encourages any of the foregoing conduct for the purpose of commercial advantage. *See id.* § 1324(a)(1)(A), (a)(1)(B)(i).

32. Bacon & Hing, *supra* note 11, at 85; Saucedo, *supra* note 11, at 1509–10; H.R. REP. NO. 99-682, pt. 1, at 51 (1986) (“Legislation pertaining to the control of illegal or undocumented immigration received serious attention by the Congress in the early 1950s and for the past 10 years, since 1971.”); *see also id.* at 46 (“Legislation establishing employer sanctions passed the House of Representatives; by overwhelming majorities in 1972 and 1973, but received no Senate action.”); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (describing IRCA as creating a “comprehensive scheme prohibiting the employment of illegal aliens in the United States”).

33. *See, e.g.*, Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243 (2017) (providing a history of the hiring of undocumented labor in the United States). Notably, prior to the enactment of IRCA, several states had laws on the books to penalize employers who hired undocumented workers, though one writer decried them as “universally unenforced and unenforceable.” Peter Schey, *The Select Commission on Immigration and Refugee Policy: A Lost Opportunity for Progress*, 4 DEFENSE ALIEN 24 (1981).

34. *See* Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 194 n.4 (quoting Senator Simpson’s statement that IRCA was SCIRP’s “basic work product”); *see also id.* at 204 (“IRCA . . . adhered remarkably closely to the core structure outlined by the Select Commission.”).

35. 1978 Amendments to the Immigration and Nationality Act, Pub. L. No. 95-412, § 4, 92 Stat. 907, 907–09, <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg907.pdf> [<https://perma.cc/W754-PWNQ>].

36. A publicly available and Google-digitized version of the SCIRP report can be found at SELECT COMM’N ON IMMIGR. & REFUGEE POL’Y, U.S. IMMIGRATION POLICY AND THE



the Commission noted that “[m]any undocumented/illegal migrants were induced to come to the United States by offers of work from U.S. employers who recruited and hired them under protection of present U.S. law.”<sup>37</sup> The Commission saw employment opportunities in the United States as a significant factor inducing migrants to come to the United States without permission.<sup>38</sup> In addition to exploring why migrants came to the United States without authorization, the SCIRP report also addressed perceived consequences of such migration, including “job displacement” and “wage depression” affecting working Americans.<sup>39</sup> The Commission concluded that “some form of employer sanctions is necessary if illegal migration is to be curtailed.”<sup>40</sup> Specifically, the Commission recommended “legislation be passed making it illegal for employers to hire undocumented workers.”<sup>41</sup>

IRCA, influenced by SCIRP, created employment sanctions in an effort to eliminate the availability of U.S. jobs identified as the “pull factor” drawing undocumented migrants to the United States.<sup>42</sup> This, legislators hoped, would also help protect U.S.-born workers.<sup>43</sup> Another important factor in the creation of employment sanctions was the fact that IRCA included an amnesty provision, granting legal status to many individuals then living in the United States without

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NATIONAL INTEREST (1981), <https://babel.hathitrust.org/cgi/pt?id=txu.059173024374848&view=1> [<https://perma.cc/P3ZB-WNBT>] [hereinafter REPORT]; see *id.* at xii (discussing the Commission’s work to obtain “the most reflective, authoritative information from individuals, groups and studies through a variety of methods, including social science/legal research . . . public hearings and sites visits . . . and consultations”).

37. *Id.* at 12.

38. *Id.* at 36.

39. *Id.* at 39–40. At least one commentator has challenged the economic reality of these conclusions and further opined that they rest on “insufficient data.” Schey, *supra* note 33, at 25.

40. REPORT, *supra* note 36, at 62; see also REPORT, *supra* note 36, at 363 (statement of Commission member Ray Marshall) (“Unless employer sanctions are enacted, U.S. efforts to curtail the entry of undocumented workers will neither be nor appear to be very effective. This will encourage further illegal immigration.”).

41. REPORT, *supra* note 36, at 304 (stating that 14 of the 16 Commission members voted in favor of employer sanctions). Peter Schey has called out the Commission’s recommendations as “differ[ing] little from the recommendations proposed by past commissions, committees, Inter-Agency task forces and the like.” Schey, *supra* note 33, at 18.

42. Espenosa, *supra* note 11, at 345–46; H.R. REP. NO. 99-682, pt. 1, at 45–46 (1986) (“The bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country.”); see also Bacon & Hing, *supra* note 11, at 79 (noting that President Obama’s emphasis on employer sanctions was explicitly intended to, in the administration’s words, “remove incentives to enter the country illegally by preventing employers from hiring undocumented workers”).

43. Heeren, *supra* note 33, at 265 (“The purpose of the new employer sanctions provision was twofold: to reduce illegal immigration and to protect the domestic labor market from competition by unauthorized migrants.”).

authorization.<sup>44</sup> Employer sanctions were, in the words of Professor Michael Wishnie, “part of a grand bargain and the principal quid pro quo” for amnesty.<sup>45</sup>

## II. INDIVIDUAL EMPLOYMENT OUTSIDE THE LAW

The employment sanctions put into place by IRCA dramatically shifted the legal landscape regarding the hiring of unauthorized workers. Yet the law does not reach every category of employment in the United States.

“Employment” under IRCA is “any service or labor performed by an employee for an employer within the United States.”<sup>46</sup> Within this language, an “employee,” is “an individual who provides services or labor for an employer for wages or other remuneration.”<sup>47</sup> And an “employer” is an individual or entity “who engages the services or labor of an employee to be performed in the United States for wages or other remuneration.”<sup>48</sup>

By statute, the term “employee” does not include those engaged in casual domestic service<sup>49</sup> nor independent contractors.<sup>50</sup> These are, accordingly, two common categories of employment that are outside the scope of IRCA—though, as explained in more detail below, hiring of independent contractors can, in fact, trigger IRCA obligations under certain circumstances.<sup>51</sup> Beyond these exemptions, some employers, while cognizant of the law, intentionally fail to follow it. This Part discusses each of these employment options in detail and addresses the significant drawbacks of these arrangements.

### A. Casual Domestic Service

The regulations that define “employment” for purposes of IRCA specifically exclude “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.”<sup>52</sup> This is consistent with the House Judiciary Committee’s report on IRCA: “It is not the intent of the Committee that sanctions would apply in the case of casual hires (i.e., those that do not involve the existence of an employer/employee relationship).”<sup>53</sup>

44. 8 U.S.C. § 1255a (1988) (granting LPR status to certain migrants who entered the United States prior to January 1, 1982).

45. Wishnie, *supra* note 34, at 196.

46. 8 C.F.R. § 274a.1(h) (2020).

47. *Id.* § 274a.1(f).

48. *Id.* § 274a.1(g).

49. *Id.* § 274a.1(f) (“The term employee . . . does not mean . . . those engaged in casual domestic employment . . .”); *id.* § 274a.1(h) (defining employment and excluding “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent”).

50. *Id.* § 274a.1(f) (“The term employee . . . does not mean independent contractors . . .”); *id.* § 274a.1(j) (defining the term independent contractor).

51. See *infra* Section II.B.

52. 8 C.F.R. § 274a.1(h) (2020).

53. H.R. REP. NO. 99-682, pt. 1, at 57 (1986). The Ninth Circuit has questioned, without resolving, whether this regulation is truly consistent with the intent of Congress as expressed in IRCA as well as the import of this particular statement from the judiciary committee. *Jenkins v. INS*, 108 F.3d 195, 200 (9th Cir. 1997) (“Even if we allowed a single,

Accordingly, employers can hire noncitizens without work authorization to complete casual domestic work.

The regulations, however, do not define this IRCA exemption any more clearly, for example, by offering guidance on just what is meant by the phrases “casual employment” or “domestic service.”<sup>54</sup> Administrative law judges (“ALJs”) working for the Office of Chief Administrative Hearing Officer (“OCAHO”), the agency responsible for enforcing IRCA,<sup>55</sup> have inconsistently interpreted the regulatory exemption for this type of work.<sup>56</sup> One ALJ concluded that this provision is “best read to include only in-house domestic labor arrangements such as maids, house-keepers, or babysitters.”<sup>57</sup> Another limited the concept to work “of a nature reasonably to be expected in the upkeep and maintenance of a residence and its curtilage,” a definition that excluded construction but would open the door to work outside the physical home.<sup>58</sup> Federal wage and hour laws, while not incorporated into IRCA, offer potential insight into the breadth of the phrase “domestic service,” interpreting it to include “companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use.”<sup>59</sup>

In sum, a household can sporadically, irregularly, or intermittently employ noncitizens to perform domestic service without running afoul of IRCA. While the rules are not bright-line clear, this exception should cover hiring the occasional undocumented babysitter or picking up a day-laborer outside of Home Depot to do a fall leaf cleanup. Thus, noncitizens without work authorization can undertake these sorts of temporary positions without leaving the hirers subject to the federal laws prohibiting unlawful employment.

### ***B. Independent Contractors***

The regulations that define “employees” for purposes of IRCA also specifically exclude “independent contractors” from that definition.<sup>60</sup> While

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conclusory assertion in the legislative history to create an ambiguity in the statute, the House Report will not support the interpretation which the agency has adopted in 8 C.F.R. § 274a.1(h). The House Report suggests, if anything, that Congress did not intend to extend the reporting requirements to employments which are extremely brief in duration. Neither the statute nor the legislative history supports the regulation’s limitation of that principle to ‘domestic’ employments.”).

54. 8 C.F.R. § 274a.1(h) (using these phrases without explanation).

55. See, e.g., U.S. DEP’T OF JUST., OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER, <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer> [https://perma.cc/2RV3-BMXS] (last updated Dec. 3, 2020).

56. 2 AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW & BUSINESS §§ 20:4, 21:17 (2d ed. 2020).

57. United States v. Dittman, 1 O.C.A.H.O. no. 195, 1289, 1293 (U.S. Dep’t of Just. 1990).

58. *Jenkins*, 108 F.3d at 201.

59. 29 C.F.R. § 552.3 (2019).

60. 8 C.F.R. § 274a.1(f) (2020) (“The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean

employers must collect information about their employees' right to work,<sup>61</sup> they do not need to collect this information for their independent contractors.<sup>62</sup>

The regulations define “independent contractors” as “individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.”<sup>63</sup> Whether any given noncitizen worker qualifies as an independent contractor is judged on a case-by-case basis considering:

Whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.<sup>64</sup>

Thus, simply calling a worker an “independent contractor” will be insufficient. One must look to the nature of the actual work provided.

There is more caselaw regarding independent contractors than domestic service. Judges have found that roofers working for a roofing contractor were not independent contractors<sup>65</sup> nor were crewmen working for a commercial fisherman.<sup>66</sup> In contrast, gardeners working on their own to complete a job were indeed independent contractors<sup>67</sup> as were individuals who stripped and cleaned floors pursuant to referred business from a single individual while those individuals also were performing similar work for other entities.<sup>68</sup> The difference comes down to the degree of control over work by the purported employer.<sup>69</sup>

While the definition of “independent contractor” is limited, the work opportunities under this category are vast, particularly in contrast to the household-

independent contractors as defined in paragraph (j) of this section or those engaged in casual domestic employment as stated in paragraph (h) of this section . . .”).

61. See *supra* note 18 (explaining this obligation); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381 (2012) (discussing how the government's obligation on employers to request evidence of work authorization turns the employers into immigration law gatekeepers).

62. U.S. CITIZENSHIP & IMMIGR. SERVS., HANDBOOK FOR EMPLOYERS M-274: 2.0 WHO MUST COMPLETE FORM I-9, <https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/20-who-must-complete-form-i-9> [<https://perma.cc/2NE3-EJXY>] (last updated Apr. 27, 2020).

63. 8 C.F.R. § 274a.1(j) (2020). This regulatory clarity contrasts with the regulation's failure to define intermittent domestic service. See *supra* note 47 and accompanying text.

64. 8 C.F.R. § 274a.1(j).

65. *United States v. Robles*, 2 O.C.A.H.O. no. 309 (U.S. Dep't of Just. 1991).

66. *United States v. Bakovic*, 3 O.C.A.H.O. no. 482, 7 (U.S. Dep't of Just. 1993).

67. *United States v. Mr. Z Enters., Inc.*, 1 O.C.A.H.O. no. 288, 30 (U.S. Dep't of Just. 1991).

68. *United States v. Siddikov*, 11 O.C.A.H.O. no. 1257, 10 (U.S. Dep't of Just. 2015).

69. *Bakovic*, 3 O.C.A.H.O. at 6.

specific limits of “domestic service.” Indeed, readers may regularly encounter noncitizens without work authorization engaged as independent contractors. Drivers for ride-sharing apps Uber and Lyft are considered independent contractors.<sup>70</sup> So are drivers for GrubHub<sup>71</sup> and Amazon Flex.<sup>72</sup> Beyond driving, individuals engaged in freelance work throughout the gig economy, doing everything from graphics design to translation to accounting to programming and beyond, commonly work as independent contractors.<sup>73</sup>

Notably, several states are interested in transforming large categories of independent contractors into employees.<sup>74</sup> California, for one, recently passed a law aiming to recategorize many workers in the gig economy as employees.<sup>75</sup> New York is also interested in reclassifying previously considered independent contractors as employees.<sup>76</sup> Insofar as the states’ recategorization of these workers would affect

70. See Advice Memorandum from Jayme L. Sopher, Assoc. Gen. Couns., U.S. NLRB., to Jill Coffman, Reg’l Director (Apr. 16, 2019), <https://src.bna.com/Ibt> [<https://perma.cc/DAE6-C5EQ>] (concluding Uber drivers were independent contractors).

71. Joel Rosenblatt, *GrubHub Ruled Contractors in Gig-Economy Milestone*, BLOOMBERG (Feb. 9, 2018), <https://www.bloomberg.com/news/articles/2018-02-08/grubhub-drivers-are-contractors-judge-rules-in-bellwether-suit> [<https://perma.cc/54FF-NW3P>].

72. Gaby Del Valle, *Amazon Is Cutting Costs with Its Own Delivery Service – but Its Drivers Don’t Receive Benefits*, VOX (Dec. 27, 2018), <https://www.vox.com/the-goods/2018/12/26/18156857/amazon-flex-workers-prime-delivery-christmas-shopping> [<https://perma.cc/3XBH-3PMY>].

73. Numerous websites facilitate independent contracting work. See, e.g., FIVERR, <http://www.fiverr.com> [<https://perma.cc/N6PX-NGF8>] (last visited Jan. 9, 2021); GRAPHITE, <http://www.graphite.com> [<https://perma.cc/YH3M-VTFM>] (last visited Jan. 9, 2021); FREELANCER, <http://www.freelancer.com> [<https://perma.cc/QP9F-G92P>] (last visited Jan. 9, 2021); UPWORK, <http://www.upwork.com> [<https://perma.cc/UK7D-F2WU>] (last visited Jan. 9, 2021).

74. There has also been some federal interest in reclassifying independent contractors as employees for purposes of federal wage law. See Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish*, BLOOMBERG LAW (July 2, 2020), <https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish> [<https://perma.cc/ZH2L-D8TW>].

75. See, e.g., *Independent Contractor Versus Employee*, CAL. DEP’T OF INDUS. REL., [https://www.dir.ca.gov/dlse/faq\\_independentcontractor.htm](https://www.dir.ca.gov/dlse/faq_independentcontractor.htm) [<https://perma.cc/57LK-9TG6>] (last visited Jan. 9, 2021) (providing analysis of Assembly Bill 5’s changes to the employment status of independent contractors); see also Robert W. Wood, *It’s Not Just Uber, California Bill Could Transform Tricky Tax and Legal Rules on Independent Contractors*, FORBES (Sept. 12, 2019), <https://www.forbes.com/sites/robertwood/2019/09/12/its-not-just-uber-ca-bill-could-transform-tricky-tax—legal-rules-on-independent-contractors/#17cee0d14ad1> [<https://perma.cc/5SLX-QN5L>].

76. Kate King, *Gig Workers Are Small Part of New York’s Low-Paid Workforce, Study Finds*, WALL ST. J., (Feb. 11, 2020), <https://www.wsj.com/articles/gig-workers-are-small-part-of-new-yorks-low-paid-workforce-study-finds-11581460667> [<https://perma.cc/Q7GJ-3K2V>] (“Lawmakers and labor groups have been talking for months about legislation to reclassify gig-economy workers, who are currently considered independent contractors, as traditional employees.”).

how the jobs are viewed in terms of immigration law,<sup>77</sup> such changes would radically restrict the type of work available to noncitizens without employment authorization, a side effect that seems to have been entirely ignored by lawmakers.<sup>78</sup>

There is another critical hitch in the independent-contractor exception to IRCA. If one “obtain[s] the labor” of an unauthorized worker through “a contract, subcontract, or exchange,” “knowing” the noncitizen does not have work authorization, the alleged employer will be “consider[ed] to have hired the alien for employment” in violation of law.<sup>79</sup> The House Judiciary Committee’s analysis of IRCA stated that this “subcontractor provision” was necessary given that: “Some sanctions laws of foreign countries have proved to be ineffective because of loopholes which enable the use of subcontractors to avoid liability. The Committee intends to prevent any such loophole in the instant legislation.”<sup>80</sup>

There is no additional legislative history explaining this provision of IRCA. It is not a concept that comes from the work of SCIRP; nothing in the Commission’s report referred to obtaining the labor of an unauthorized worker through a contract, subcontract, or exchange. Nor, as it turns out, has there been any caselaw illuminating the scope of the “obtain the labor” prohibition of 8 U.S.C. § 1324a(a)(4).<sup>81</sup>

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77. It would be possible for the term “independent contractor” to be understood differently under federal immigration law than under state law. For example, in *Adams v. Howerton*, Chief Judge Irving Hill determined that the validity of a same-sex marriage under Colorado law was irrelevant to the question of whether a same-sex marriage could be valid for purposes of immigration law. 486 F. Supp. 1119, 1121–22 (C.D. Cal. 1980).

78. Lawmakers may be unaware of these side effects. Or they may be disinterested in them. After all, noncitizens are, by their nature, not voting constituents whose interests need to be represented. That said, given the myriad of ways in which California and New York have worked to position themselves as pro-immigrant states, it seems likely that they have not considered the immigration consequences of the legal changes contemplated.

79. 8 U.S.C. § 1324a(a)(4) (2020) (setting out this restriction); *id.* § 274a.1(c) (defining the term “hire” in accordance with these restrictions).

80. H.R. REP. NO. 99-682, pt. 1, at 62 (1986).

81. Only one reported case has engaged with 8 U.S.C. § 1324a(a)(4)’s prohibition on obtaining the labor of an undocumented migrant: *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005). That case, however, is ultimately unhelpful in illuminating the statute’s scope. The *Rosa* case concerned remedies available for personal injury under New Hampshire tort law. The defendants argued that the plaintiff in *Rosa* should not be able to recover lost wages measured by U.S. wage rates because the plaintiff was not authorized to work in the United States. The Supreme Court of New Hampshire agreed as a general matter but then applied a public policy exception, thus dismissing the defendants’ objection. The Court’s reasoning was as follows: The Court held that “generally an illegal alien may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment.” *Id.* at 1000. The Court, however, recognized an exception “to allow an award of such damages against a person responsible for an illegal alien’s employment when that person knew or should have known of that illegal alien’s status.” *Id.* And the Court found requisite knowledge in the case before it on the basis that the defendant general contractors should be held to “a standard based upon constructive knowledge because to hold otherwise would provide a general contractor with a convenient

The most reasonable interpretation of the “subcontractor provision” is that it was designed solely to ensure that would-be employers could not escape the statute’s restrictions by engaging a strawman—a third party—to employ the undocumented worker. Under this reading, the subcontractor provision would not come into play without an employment relationship between the undocumented worker and the third party hired by the erstwhile employer. That is, the subcontractor provision targets just one thing: laundering the employment relationship. This is the “loophole” Congress intended to close with § 1324a(a)(4).

This interpretation of § 1324a(a)(4) is tremendously important for undocumented business owners. It means that IRCA does not prohibit the hiring of a true independent contractor even if the party benefitting from their labor knows that the individual lacks work authorization. Nor does it prohibit the hiring of a third party who, in turn, forms a true independent-contractor relationship with an undocumented worker. Given that undocumented business owners can work without ever creating an employment relationship prohibited by IRCA, as will be explained in Part III, this means the subcontractor provision does not stand as a hurdle to their lawful work while undocumented.

The correctness of this interpretation of § 1324a(a)(4) is bolstered by the history of IRCA. As noted previously, IRCA utterly changed the landscape of law by making the employment of undocumented workers illegal for the first time in more than two hundred years.<sup>82</sup> The goal of the law was “ending the magnet that lures [undocumented workers] to this country.”<sup>83</sup> The House Judiciary Committee specifically noted, “Employment is the magnet that attracts aliens here illegally.”<sup>84</sup> Employment. Not work. This distinction matters. As explored in more detail below,<sup>85</sup> true independent contractor work has significant drawbacks not associated

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device to insulate itself from damages, because it would be all too easy to claim ignorance.” *Id.* at 1001. The federal statute at 8 U.S.C. § 1324a(a)(4) entered into the Court’s discussion when it came to examining the policy rationales for the imputation of constructive knowledge to recognize liability under the circumstances of the case. The New Hampshire Court drew analogy to § 1324a(a)(4)’s provision of liability under circumstances of actual knowledge. *Id.* The *Rosa* case never addressed the scope of § 1324a(a)(4) in terms of federal civil and criminal liability.

It is worth noting that the New Hampshire Court only made its analogical encounter with § 1324a(a)(4) because the Court misconstrued federal immigration law. As discussed above, being employed is not unlawful for an undocumented individual; rather, it is the employing of such an individual that is unlawful for the employer. *See supra* notes 16–18 and accompanying text. In speaking of an “illegal alien engage[d] in unlawful employment,” *Rosa*, 868 A.2d at 1000, the New Hampshire Court showed that it failed to grasp this distinction. Indeed, if the New Hampshire Court had correctly understood the federal law, the Court could have reached the same result—imposing liability for lost wages measured by U.S. wage rates—in a more straightforward manner. This is because without the erroneous understanding that the plaintiff’s lost-wages theory assumed the plaintiff’s flouting of federal law, the New Hampshire Court would not have been led to conclude that the lost-wages theory was improper.

82. *See supra* notes 32–33 and accompanying text.

83. H.R. REP. NO. 99-682, pt. 1, at 45–46.

84. *Id.* at 46.

85. *See infra* Section II.D.

with employment. Thus, it is only reasonable to read § 1324a(a)(4) as concerned exclusively with work that, at least somewhere in the chain of contractor relationships, involves employment.

This interpretation of § 1324a(a)(4) is consistent with the one case that, while not fully litigated,<sup>86</sup> raised the potential of liability under the subcontractor provision: Walmart.<sup>87</sup> Walmart stood accused of hiring more than 100 companies to conduct overnight cleaning of over 700 stores.<sup>88</sup> Those cleaning companies, in turn, hired hundreds of undocumented workers to clean the Walmart stores.<sup>89</sup> It is this exact employment structure that the subcontractor provision of IRCA intended to prohibit—Walmart getting the benefit of work done by the undocumented employees of their subcontractors.<sup>90</sup>

What does all this mean? True hiring of independent contractors does not present a problem under IRCA. If Hank's Hardware hires Anna to prepare the store's annual taxes and Anna is an independent contractor, Hank's Hardware is under no obligation to investigate or determine Anna's immigration status. Nor is Hank's Hardware in violation of IRCA even if the company knows that Anna is undocumented. However, if Hank's Hardware hires Tucker's Temps to provide all cashiers for the company, and Tucker's Temps employs undocumented workers, Hank's Hardware will run afoul of IRCA's subcontractor provision.

### C. Working for Employers Who Ignore IRCA

IRCA created civil and criminal penalties for employers who hire noncitizens without work authorization. Yet many employers have been entirely undeterred by these changes.<sup>91</sup> Employers in this vein tend to fall into two categories. The first category comprises employers who ostensibly follow the letter of IRCA—insisting on documents from employees regarding their identity and work

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86. The company was not civilly fined nor criminally prosecuted for its conduct. Greenhouse, *supra* note 23. Walmart admitted no wrong-doing and characterized the millions paid to the government as a voluntary contribution towards immigration enforcement. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. The Walmart investigation may have been the quintessential invocation of IRCA's "subcontractor provision," but it doesn't mean the government would have had an easy time pursuing civil or criminal penalties against Walmart. Section 1324a(a)(4) is triggered by "knowing that the alien is an unauthorized alien . . . with respect to performing such labor." Walmart steadfastly denied knowledge of the janitors' immigration status. *Id. But see Wal-Mart Execs Knew of Illegal Workers, U.S. Says*, L.A. TIMES (Nov. 8, 2005) <https://www.latimes.com/archives/la-xpm-2005-nov-08-fi-walmart8-story.html> [<https://perma.cc/2VAU-X9LE>] (reporting an unsealed federal affidavit alleged "taped conversations from 2003 showed that two executives at Wal-Mart headquarters knew that contractors and subcontractors cleaning its stores in several states employed illegal immigrants from Eastern Europe and elsewhere").

91. See, e.g., Eric Schine, *Sanctions Fail to Cut Alien Jobs; Threat of Penalties Ignored in Hiring of Illegal Workers*, L.A. TIMES (May 2, 1988), <https://www.latimes.com/archives/la-xpm-1988-05-02-mn-1454-story.html> [<https://perma.cc/EZL7-QAGV>] ("Many acknowledge that they knowingly accept questionable documents, while others are ignoring the law's requirements altogether.").



authorization while either knowing such documents are fraudulent<sup>92</sup> or ignoring the questionable authenticity of the documents presented to them,<sup>93</sup> or hiring subcontractors who themselves rely on undocumented workers.<sup>94</sup> The second category consists of employers who hire without checking for documentation at all.<sup>95</sup> Both groups act out of a desire to reap the financial benefits of employing unauthorized workers.

It is not particularly risky to hire noncitizens without work authorization.<sup>96</sup> Since IRCA's enactment in 1986, the government has consistently "de-prioritized enforcement employer sanctions relative to other immigration enforcement responsibilities."<sup>97</sup> There has been bipartisan support for this de-prioritization with, as Professor Michael Wishnie has noted, "politicians of both parties regularly interven[ing] when . . . worksite enforcement disrupts important local industries."<sup>98</sup> Moreover, since the events of 9/11, the government has deployed workplace enforcement with an eye towards homeland security rather than pure unlawful

92. *Id.* ("[M]any employers encourage their employees to submit false documentation."); *see also* Sarah B. Horton, *From "Deportability" to "Denounce-Ability: New Forms of Labor Subordination in an Era of Governing Immigration Through Crime*, 39 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 312, 318–19, 322 (2016) (discussing employers who facilitate the hiring of undocumented workers using the paperwork from another individual).

93. *See, e.g.*, Schine, *supra* note 91 ("I don't want to give the impression that I'm sitting here knowingly taking false documents. But I'm not going to assume it's fake unless its printed on an envelope," said Patrick Shea, a vice president of Beacon Bay Enterprises, which owns and operates 11 car washes in Orange County."); Melissa Sanchez, *Inside the Lives of Immigrant Teens Working Dangerous Night Shifts in Suburban Factories*, PRO PUBLICA (Nov. 19, 2020), <https://www.propublica.org/article/inside-the-lives-of-immigrant-teens-working-dangerous-night-shifts-in-suburban-factories> [<https://perma.cc/5854-WVLJ>] ("The teenagers use fake IDs to get the jobs through temporary staffing agencies that recruit immigrants and, knowingly or not, accept the papers they are handed.").

94. *See, e.g.*, Sanchez, *supra* note 93 (discussing the hiring of undocumented teenagers by temporary staffing agencies who, in turn, send workers to U.S. factories); Wishnie, *supra* note 34, at 214 (noting undocumented workers find employment with "shadowy subcontractors whose entire raison d'être is to insulate mainstream firms from IRCA liability"); Charles Scudder, *Why an Allen Business Raided by ICE May Avoid Severe Penalties*, DALL. MORNING NEWS (Apr. 27, 2019), <https://www.dallasnews.com/news/immigration/2019/04/27/why-an-allen-business-raided-by-ice-may-avoid-severe-penalties/> [<https://perma.cc/WFA5-TY5V>] (discussing the use of a staffing company to supply labor to CVE, a company that refurbished cellphones and other electronics and was raided by ICE, leading to nearly 300 undocumented workers being taken into custody).

95. *See, e.g.*, Schine, *supra* note 91 ("Five workers said that they could obtain false documents if they needed to, but they don't bother because their employers don't ask for documentation.").

96. As Peter Schey accurately predicted prior to the enactment of IRCA, the threat of employer sanctions inadequately deters employers from hiring undocumented labor because the potential penalties do not outweigh the profitability gains resulting from hiring undocumented workers, and the prohibitions are insufficiently enforced. Schey, *supra* note 33, at 26.

97. Wishnie, *supra* note 34, at 205.

98. *Id.* at 210.

employment.<sup>99</sup> The odds of catching the government’s enforcement eye are low. Fewer than 0.02% of U.S. employers are civilly fined for unlawful employment.<sup>100</sup> Criminal convictions are rare.<sup>101</sup> Prison time is rarer still.<sup>102</sup>

Employers who take identity documents at face value have some legal protection. They can accept more than two dozen forms of identification as proof of authorization to work, and they are under no obligation to verify the authenticity of documents presented by employees.<sup>103</sup> Indeed, employers are further helped by the defense of “good faith”: if they can reasonably say that the documents a migrant presented before starting their position appeared authentic, they are entitled to raise an affirmative defense.<sup>104</sup> On the other hand, employers are liable for “knowing” that an employee is undocumented,<sup>105</sup> and that term is defined broadly and includes constructive knowledge; thus, employers can be held liable if “notice of certain facts and circumstances” would lead an employer taking reasonable care to know that the employee is undocumented.<sup>106</sup> Still, as one attorney put it: “It’s very hard for the government to prove what an employer knows in his head about his workers.”<sup>107</sup>

99. ANDORRA BRUNO, CONG. RSCH. SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 2 (2015).

100. *Id.* at 4.

101. Miriam Jordan, *Trump’s Crackdown on Illegal Immigration: 11 Employers Prosecuted in the Past Year*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/us/illegal-immigration-employers-prosecutions.html> [<https://perma.cc/9SMG-ZPWC>] (noting that from March 2018 through March 2019, only 11 employers faced criminal charges for hiring unauthorized workers); *HSI FY 18 Achievements: Workplace Enforcement*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/features/worksite-enforcement> [<https://perma.cc/5LCK-DESG>] (last updated Aug. 7, 2019) (reporting just forty-nine managers were convicted in fiscal year 2018, down from fifty-five in the prior fiscal year).

102. Alissa Zhu & Maria Clark, *A Year After Mississippi ICE Raids, Chicken Plants Face Few Penalties as Families Suffer*, MISS. CLARION LEDGER (Aug. 7, 2020), <https://www.clarionledger.com/in-depth/news/2020/08/07/mississippi-ice-raids-immigrants-struggle-few-penalties-chicken-plants/5407320002/> [<https://perma.cc/MZ75-2KHV>] (“[C]riminal cases are typically settled in court with the company agreeing to pay a fine and operate under ICE monitoring for several years. Company managers or owners could face jail time, but it’s rare . . .”); *see also* Jordan, *supra* note 101 (noting that only 3 of the 11 employers convicted of hiring unauthorized workers between March 2018 and March 2019 served prison time); *Few Prosecuted for Illegal Employment of Immigrants*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (May 30, 2019), <https://trac.syr.edu/whatsnew/email.190530.html> [<https://perma.cc/LB4Q-F9B7>] (“Not only are few employers prosecuted, fewer who are convicted receive sentences that amount to more than token punishment.”).

103. Muzaffar Chishti & Charles Kamaski, *IRCA in Retrospect: Guideposts for Today’s Immigration Reform*, MIGRATION POLICY INST. 2–3 (Jan. 2014), <https://www.migrationpolicy.org/research/irca-retrospect-immigration-reform> [<https://perma.cc/B9PF-Z2JH>].

104. 8 U.S.C. § 1324a(a)(3) (establishing a “good faith” affirmative defense to charges of improper hiring). *But see* Schine, *supra* note 91 (“[M]any [employers] said they believe they are hiring illegals, but they make a point of not finding out for sure.”).

105. 8 U.S.C. § 1324a(a)(1)(A).

106. 8 C.F.R. § 274a.1(i)(1) (2020).

107. Jordan, *supra* note 101 (quoting Pasco, Washington immigration attorney Tom Roach).

Even egregious violators of the restrictions against employing undocumented migrants do not face particularly harsh penalties. Take the most dramatic workplace raid in recent history: In 2019, some 680 noncitizens were arrested while working at Mississippi poultry plants without authorization.<sup>108</sup> Two years later, just four managers at two of the seven plants involved had been indicted for their roles in violating IRCA obligations.<sup>109</sup> The companies, their owners, and their top executives have not been criminally charged.<sup>110</sup>

#### ***D. Drawbacks of Employment Outside the Law***

Employment outside the law—whether intermittent domestic help, independent contracting, or working for employers who ignore the law—is undesirable on many levels. As explored below, it tends to be irregular, unstable, low-paid, without benefits, physically demanding, and subject to exploitation.

Employment outside of IRCA tends to be irregular. A worker cannot know on a daily or weekly basis what work they will be able to secure, much less at what wage. A worker might be selected at a meeting place for an eight-hour shift at \$15/hour, or they may not be selected at all.<sup>111</sup> This same irregularity plagues independent contractors who typically work for more than one client, each of whom has diverse needs at varying times. Inconsistent income is a problem for workers who, naturally, need to match that variable income to consistent financial obligations such as rent, food, and childcare.

A somewhat different concern with these forms of work centers on the issue of stability. The irregular work just identified could easily be understood as unstable. But the concept of stability extends to work for employers who flaunt IRCA obligations, which would not be considered irregular as it tends to involve consistent hours and work obligations. Working for IRCA-violating employers is unstable because employers who are aware of their employees' lack of work authorization can fire the undocumented worker at any time.<sup>112</sup> Such employers

108. Hannah Denham, *Investigators Believe Five Poultry Companies Violated Immigration Law, Search Warrants Say*, WASH. POST (Aug. 15, 2019), <https://www.washingtonpost.com/business/2019/08/15/investigators-believe-five-poultry-companies-violated-immigration-law-search-warrants-say/> [<https://perma.cc/LTB8-FWGG>].

109. Zhu & Clark, *supra* note 102.

110. Denham, *supra* note 108; Zhu & Clark, *supra* note 102 (“[T]he top executives at the chicken processing companies targeted in the raids have yet to face penalties for their role in hiring hundreds of undocumented workers and profiting from their labor.”); *see also* Sanchez, *supra* note 93 (noting two publicized prosecutions regarding adults who required teens to work off immigration-smuggling debt, neither of which involved prosecuting the temp agencies that hired the teens nor the factories where the temp agencies sent them to work).

111. *See, e.g.*, Nik Theodore et al., *La Esquina (The Corner): Day Laborers On The Margins of New York's Formal Economy*, 9 WORKING USA 41 (2006) (reporting results of empirical research regarding day laborers who reported about their inconsistent employment, noting few “good weeks” with five days of employment).

112. *See, e.g.*, Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STANFORD L. REV. 1103, 1103 (2009) (discussing employers' ability to threaten workers with deportation if they challenge their working conditions); *see also* Mica Rosenberg & Kristina

could even find justification in IRCA itself and the law's continuing obligation for employers to let go of any employee that an employer discovers lacks work authorization.<sup>113</sup>

Workers of all types operating outside of IRCA are subject to low wages.<sup>114</sup> Employers who hire noncitizens without work authorization typically do so in order to benefit from the low wages noncitizens command.<sup>115</sup> This holds true for domestic service, independent contractors, and under-the-table work. Individuals may be paid below minimum wage,<sup>116</sup> may not receive overtime pay,<sup>117</sup> or may not be paid at all.<sup>118</sup> Employers utilize these tactics knowing that noncitizens are unlikely to seek redress given that court action, if taken, would reveal the workers are present in the United States without authorization.<sup>119</sup>

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Cooke, *Allegations of Labor Abuses Dogged Mississippi Plant Years Before Immigration Raids*, REUTERS (Aug. 9, 2019), <https://www.reuters.com/article/us-usa-immigration-koch-foods/allegations-of-labor-abuses-dogged-mississippi-plant-years-before-immigration-raids-idUSKCN1UZ1OV> [<https://perma.cc/ZX8B-7X3S>] (reporting that supervisors at chicken processing plants in Mississippi threatened to turn undocumented workers in to government if they spoke out about abuses at the plants).

113. 8 U.S.C. § 1324a(a)(2); *see also* Wishnie, *supra* note 34, at 215 (“If immigrant workers seek to form a union, demand overtime pay, resist sexual harassment, or otherwise defend their interests in the workplace, employers often insist on ‘reverifying’ their documents or, more aggressively, request an immigration raid to target activist workers.”); Bacon & Hing, *supra* note 11, at 83 (discussing the Obama administration’s strategy of auditing employers who would then fire their undocumented employees).

114. King, *supra* note 76 (reporting that the median yearly earnings of New York’s low-paid independent contractors was about \$20,000); *see also* BRUNO, *supra* note 99, at 11.

115. Schine, *supra* note 91 (“A personnel manager at a posh Orange County hotel said she couldn’t compete with other luxury hotels if it weren’t for the more than 100 mostly Latino workers who make beds and wash dishes for low wages.”); *id.* (reporting on a Los Angeles garment manufacturing shop that “depends on recent arrivals from El Salvador and Mexico to work at such low wages”).

116. *See, e.g.*, Nicholas Reimann, *Chicken Plants Paid Workers Below Minimum Wage, Hired a Child, Labor Department Says*, FORBES (Nov. 20, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/11/20/chicken-plants-paid-workers-below-minimum-wage-hired-a-child-labor-department-says/?sh=56dfbae85a9f> [<https://perma.cc/62HC-GZ55>] (noting allegation that Koch Foods “used tactics like failing to pay final paychecks and taking illegal deductions from workers’ wages by making them pay for things like gloves and aprons to pay them below minimum wage”).

117. *Id.* (noting allegation that Koch Foods “paid workers overtime at a lower rate than is required by law”).

118. *Id.* (noting allegation that Koch Foods failed to pay final paychecks). This particular tactic is known as “wage theft.” *See* Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759 (2019) (noting wage theft “costs workers billions of dollars each year” and exploring state and local anti-wage theft laws); Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013) (noting undocumented workers experience wage theft at “alarmingly high rates” and exploring collective adjudication of FLSA claims to recover stolen earnings).

119. Of course, not all undocumented workers are deterred from seeking legal redress. *See, e.g.*, *Lepe v. Luft Enters.*, No. E067382 (Cal. Ct. App. May 10, 2018) (successful lawsuit by undocumented employees for wage theft).

Benefits are another thing that workers in these types of employment situations frequently lack. Itinerant workers, whether performing casual domestic service or working as independent contractors, infrequently receive paid time off, sick days, vacation, or insurance.<sup>120</sup> Injured workers may or may not be entitled to workers compensation, depending on the state where they work.<sup>121</sup> Even when undocumented workers secure full-time positions, employers who knowingly hire them despite IRCA are unlikely to provide access to these types of benefits.<sup>122</sup>

Work outside of IRCA is often physically demanding. Principal nondomestic employers are agriculture, construction, hospitality (hotel workers) service (restaurants), and meat packing.<sup>123</sup> Picking fruits and vegetables frequently involves maintaining a hunched-over position, moving rapidly, and wielding a sharp knife.<sup>124</sup> Roofers are susceptible to burns from tars and chemicals, electrocution from power lines, and injuries from falling or from having tiles and other debris fall

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120. See Miriam A. Cherry, *Decentering the Firm: The Limited Liability Company and Low-Wage Immigrant Women Workers*, 39 U.C. DAVIS L. REV. 787, 799–800 (2006) (noting “lack of health insurance, sick leave, worker’s compensation, and other benefits commonly associated with employment” as significant problems for “underground” workers).

121. Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 UC IRVINE L. REV. 125, 132 n.26 (2012) (noting undocumented individuals are entitled to workers compensation in most, but not all, states); see also Horton, *supra* note 92, at 319 (noting access to workers compensation in California).

122. A federal prosecutor who pursues IRCA cases told me that IRCA-violating companies frequently make the legally required contributions for social security, unemployment insurance, and workers compensation for their U.S. citizen employees but make no such payments for their undocumented employees. See also BRUNO, *supra* note 99, at 11 (discussing employers who fail to pay their share of social security taxes attributable to undocumented workers); Rosenberg & Cooke, *supra* note 112 (reporting allegations that supervisors at Mississippi chicken processing plants “coerced payments from them for everything from medical leave and promotions to bathroom breaks”).

123. See, e.g., PEW RSCH. CTR., SHARE OF UNAUTHORIZED IMMIGRANT WORKERS IN PRODUCTION, CONSTRUCTION JOBS FALLS SINCE 2007, at 11 (2015), [https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/03/2015-03-26\\_unauthorized-immigrants-passel-testimony\\_REPORT.pdf](https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/03/2015-03-26_unauthorized-immigrants-passel-testimony_REPORT.pdf) [<https://perma.cc/B2RZ-3NCS>]; Mary Jo Dudley, *These U.S. Industries Can’t Work Without Illegal Immigrants*, CBS NEWS (Jan. 10, 2019), <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/> [<https://perma.cc/X3Z7-7BU7>]; John Burnett, *Employers Struggle with Hiring Undocumented Workers: ‘You Cannot Hire American Here,’* NAT’L PUB. RADIO (Aug. 21, 2019), <https://www.npr.org/2019/08/21/752336132/employers-struggle-with-hiring-undocumented-workers-you-cannot-hire-american-her> [<https://perma.cc/LGA9-QXQS>]; see also Sanchez, *supra* note 93 (discussing undocumented teenagers working in factories that process candy, fish, chicken, baked goods, even automotive parts); Schine, *supra* note 91 (listing restaurants, car washes, janitorial services, gardening, and construction as principal employers of undocumented workers in Southern California).

124. See, e.g., GABRIEL THOMPSON, WORKING IN THE SHADOWS: A YEAR OF DOING THE JOBS (MOST) AMERICANS WON’T DO (2011) (describing his experience as a lettuce picker).

on them.<sup>125</sup> Maids in hotels lift hundreds of pounds a day just changing linens.<sup>126</sup> Dishwashers in restaurants face hot pans, broken glass, and sharp knives in addition to scalding water.<sup>127</sup> And meat-packers, as you might imagine, face extraordinarily high injury rates as well as high rates of serious injury<sup>128</sup> as they kill, cut, debone, and package meat.<sup>129</sup> Across all jobs, migrants face substantially greater rates of injury and death than citizen workers.<sup>130</sup>

One final area of concern involves the incredible power differential between workers and employers in all of these employment relationships existing outside of IRCA. That differential can lead to exploitation of many types beyond those already listed.<sup>131</sup> It might involve pressuring workers to engage in dangerous

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125. See, e.g., Les Christie, *America's Most Dangerous Jobs*, CNN MONEY (Sept. 11, 2014), <https://money.cnn.com/gallery/pf/jobs/2014/09/11/most-dangerous-jobs/4.html> [<https://perma.cc/M7V7-UMS4>].

126. See, e.g., Donald Cohen, *Cutting Back on Housekeepers' Heavy Lifting*, L.A. TIMES (Aug. 2, 2011), <https://www.latimes.com/opinion/la-xpm-2011-aug-02-la-oe-cohen-maids-20110802-story.html> [<https://perma.cc/JT97-A3JU>] (noting a single luxury mattress typically weighs more than 100 pounds a day and housekeepers make up sixteen to twenty-five beds daily).

127. See, e.g., Tom Sietsema, *At the Heart of Every Restaurant*, WASH. POST (Aug. 7, 2017), <https://www.washingtonpost.com/sf/style/2017/08/07/chefs-say-a-dishwasher-can-make-or-break-a-restaurant-so-i-signed-up-for-a-shift/> [<https://perma.cc/5UC4-WP78>] (a food critic takes on dishwashing).

128. See, e.g., Eric Schlosser, *The Chain Never Stops*, MOTHER JONES (July/Aug. 2001), <https://www.motherjones.com/politics/2001/07/dangerous-meatpacking-jobs-eric-schlosser/> [<https://perma.cc/5L9F-WVE4>].

129. See, e.g., “*When We’re Dead and Buried, Our Bones Will Keep Hurting*,” HUMAN RTS. WATCH (Sept. 4, 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat#> [<https://perma.cc/A6WW-JKVZ>].

130. Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1625 (2018). While the U.S. Bureau of Labor Statistics does not break down worker accidents by citizenship, the agency does report that Hispanic or Latino workers accounted for 20% of all fatal occupational injuries in 2019. U.S. BUREAU OF LAB. STAT., CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY (2019), <https://www.bls.gov/news.release/cfoi.nr0.htm> [<https://perma.cc/R7ZY-MZGJ>]. In addition, construction and agriculture—which, as discussed *supra* note 123, are dominated by undocumented workers—are among the industries with the largest number of fatal occupational injuries. U.S. BUREAU OF LAB. STAT., TABLE 4. FATAL OCCUPATIONAL INJURIES FOR SELECTED INDUSTRIES, 2015–19, <https://www.bls.gov/news.release/cfoi.t04.htm> [<https://perma.cc/6MUY-BCZ9>]; see also *Agricultural Safety*, CDC, <https://www.cdc.gov/niosh/topics/aginjury/default.html> [<https://perma.cc/Y3K9-F8PQ>] (noting that agricultural workers are “at very high risk for fatal and nonfatal injuries”); Theodore et al., *supra* note 111, at 416–17 (reporting day laborers surveyed not only endured “a high incidence of workplace injury” but 61% of those exposed to hazardous conditions were not provided either protective clothing or safety equipment and 20% of full-time day laborers present in the United States for at least one year “have suffered one or more injuries at work”).

131. See, e.g., Joey Hipolito, *Learning from RICO: Immigration Enforcement Through Employer Accountability*, 20 BERKELEY LA RAZA L.J. 67, 73 (2010) (“[E]mployers intentionally hire undocumented immigrants to exploit their vulnerabilities stemming from

work such as construction without proper safety equipment.<sup>132</sup> It might lead to denying workers breaks or access to food and water.<sup>133</sup> It might lead to physically abandoning a day laborer at a worksite.<sup>134</sup> It might involve pressure to accept sexual harassment or abuse in order to maintain employment.<sup>135</sup> It might be taking advantage of desperate teenagers, hiring them to do work they should not be doing at all.<sup>136</sup>

In this Part we reviewed the three principal means for individuals to work without entangling employers in IRCA’s restrictions: intermittent domestic labor, independent contracting, and working for employers who ignore the law. As discussed, each of these options have significant drawbacks. The next Part discusses better options that can insulate workers from the above drawbacks.

### **III. BUSINESS ENTITY SOLUTIONS**

Workers who pursue their occupations not as individuals but through the medium of business entities have the potential to avoid hurdles imposed by IRCA while also avoiding many of the downsides of employment outside the law. Yet at present, it is estimated that less than 8% of undocumented immigrants in the U.S. run their own businesses.<sup>137</sup>

This Part discusses a variety of business entity options for noncitizen workers—partnerships, corporations, and LLCs—assessing the benefits and drawbacks of each. I conclude that LLCs offer the most promising solution for undocumented migrants seeking lawful work in the United States.

Before diving into business entities, however, it makes sense first to address sole proprietorships. A sole proprietorship is not a business entity as such, but it is, in a sense, the primordial business structure; thus, it forms the starting point

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their immigration status.”); Bruno, *supra* note 99, at 11 (noting employers who hire undocumented workers may do so because they are “less likely to complain about ill treatment”).

132. See, e.g., Mythili Rao, *Undocumented Workers Awarded \$3.85 Million in Accidents*, CNN (June 17, 2009), <https://www.cnn.com/2009/CRIME/06/17/new.york.undocumented.workers.lawsuit/index.html> [<https://perma.cc/2C5V-7975>] (“[U]ndocumented workers are likely to work at sites that lack safety equipment and OSHA regulation compliance.”).

133. See Theodore et al., *supra* note 111, at 417; Maria Eugenia Fernández-Esquer, Maria Carolina Agoff & Isabel M. Leal, *Living Sin Papeles: Undocumented Latino Workers Negotiating Life in “Illegality,”* 39 *HISP. J. BEHAVIORAL SCI.* 3, 10 (2017) (discussing a separate study of day laborers who also reported being denied water and times for breaks).

134. Theodore et al., *supra* note 111.

135. See Rosenberg & Cooke, *supra* note 112 (detailing sexual and physical assaults on undocumented workers in Mississippi chicken processing plants); Cherry, *supra* note 120, at 792.

136. See, e.g., Sanchez, *supra* note 93 (discussing teenagers working late-night shifts in factories); Rosenberg & Cooke, *supra* note 112 (noting eighteen juveniles, including one fourteen-year-old, were picked up in the 2019 raids on Mississippi meatpacking plants); see also Horton, *supra* note 92, at 320 (discussing a teenager injured on the job and thereafter fired by his employer “[i]n an attempt to evade detection for its violation of child labor laws—and to avoid paying the boy benefits”).

137. NEW AM. ECON., *supra* note 10.

for describing the distinguishing features of business entities such as partnerships, corporations, and LLCs.<sup>138</sup>

#### A. *Sole Proprietorships*

A “sole proprietorship” is “a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.”<sup>139</sup> It is a business form without legal formality<sup>140</sup> that is “neither a creature of statute nor of contract.”<sup>141</sup> A sole proprietorship is deemed to exist when an individual starts operating a business. For example, Sandra might start doing business as “Sandra’s Sewing,” doing tailoring work out of a storefront or her own home. Alternatively, an individual might hold themselves out to be “doing business as” (often seen in legal documents as “d/b/a”) an entity.<sup>142</sup> For example, Terry might be a pool cleaner, but he calls his business Ocean Blue.<sup>143</sup> Sandra’s and Terry’s businesses are sole proprietorships.

Given that it is so easy to start a sole proprietorship, it should hardly be surprising that most businesses in the United States are sole proprietorships.<sup>144</sup> And starting such a business would be equally easy for an undocumented migrant. Indeed, the fact that sole proprietorships can be started without interacting with a governmental entity<sup>145</sup> and can continue to operate, in many cases, without government oversight<sup>146</sup> gives this type of business structure an edge in terms of

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138. Readers may find helpful the “Comparing Business Structures” chart: *Business Structure Comparison*, UW CTR. FOR COOPS., <https://uwcc.wisc.edu/about-coops/business-structure-comparison/> [<https://perma.cc/N4SQ-6APB>] (last visited Feb. 15, 2022).

139. *Sole Proprietorship*, BLACK’S LAW DICTIONARY (11th ed. 2019).

140. Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215, 219 (2009) (noting sole proprietorships can be formed “without any formality”) [hereinafter Crusto, *Unconscious Classism*].

141. Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act (LLSP)*, 2001 COLUM. BUS. L. REV. 381, 386 [hereinafter Crusto, *Extending the Veil*].

142. See, e.g., ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS 251 (4th ed. 2006).

143. An owner who gives their business a fictitious name must typically file paperwork with the state to give individuals notice of who is operating under that name. See, e.g., Crusto, *Unconscious Classism*, *supra* note 140, at 256.

144. Crusto, *Extending the Veil*, *supra* note 141, at 386; Crusto, *Unconscious Classism*, *supra* note 140, at 220.

145. Crusto, *Extending the Veil*, *supra* note 141, at 387 (“No documentation or filing is essential to create a sole proprietorship.”); *id.* at 389 (“A sole proprietor is free to transact business interstate without prior permission, subject to restrictions on certain professions or business activity requiring local residency.”).

146. General licensing and operating statutes may apply to the business. Crusto, *Unconscious Classism*, *supra* note 140, at 257. For example, in the state of Oklahoma, licenses are required for electrical, plumbing, heating, and air conditioning service contractors, among other professionals. *Business Licensing + Operating Requirements*, OKLA. COM., <https://www.okcommerce.gov/doing-business/startups-entrepreneurs/business-licensing-operating-requirements/> [<https://perma.cc/9NCS-ZBKQ>] (last visited Jan. 10,



owner privacy.<sup>147</sup> Such privacy might be particularly appealing to undocumented owners who do not wish to draw attention to their lack of immigration status.

While there are benefits to doing business as a sole proprietorship, there are downsides as well. The most significant downside is that the owner has created a business but not a separate business entity.<sup>148</sup> With a sole proprietorship, there is no legal distinction between the business and the individual.<sup>149</sup> The natural person and the business are the same legal person. As a result, should the business incur any liabilities—contractual or tort, incurred by the owner, his employees, or his agents—the business’s liabilities become the personal liabilities of the sole proprietor.<sup>150</sup>

Of course, sole proprietors often hire employees. Imagine a sole proprietorship owned by Luis: Luis’s Landscaping. If Luis is successful in this work, he will undoubtedly hire employees to help with the workload. Imagine if one of those employees, Jonathan, hits a pedestrian while driving the company truck on his way to a job. Luis will be on the hook for the pedestrian’s injuries and, if sued, may have to liquidate personal assets to pay a judgment.<sup>151</sup> This unlimited personal liability of the business owner is often the reason why individuals choose to form a separate business entity with greater liability protection—such as a corporation or LLC. Before examining those entities, however, another significant entity in the United States deserves consideration: the partnership.

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2021). A relevant issue that is nonetheless outside the scope of this Article is the extent to which states allow undocumented individuals to obtain necessary licenses. In March 2020, New Mexico became the first state to pass a law dictating that citizenship and immigration status will be irrelevant to the state’s occupational and professional licensing. S. 137, 54th Leg., 2d Sess. (N.M. 2020), <https://www.nmlegis.gov/Sessions/20%20Regular/final/SB0137.PDF> [<https://perma.cc/HY9Z-WYFP>]; see also Lee, *supra* note 130, at 1621 (advocating for “undocumented work resistance” by states and localities, including through granting professional licenses to undocumented migrants).

147. Crusto, *Extending the Veil*, *supra* note 141, at 388 (“Sole proprietors are less subjected to governmental oversight and are allowed more privacy than corporations.”); see also Jayesh Rathod, *Further Consideration: Immigrant Entrepreneurs—Contributions and Challenges*, in COMMUNITY ECONOMIC DEVELOPMENT LAW 180 (Susan D. Bennett et al. eds., 2012) (“[I]mmigrants who lack legal status will be especially reluctant to engage with government representatives.”).

148. Crusto, *Extending the Veil*, *supra* note 141, at 399 (citing Larry E. Ribstein, *The Loneliest Number: The Unincorporated Limited Liability Sole Proprietorship*, 1 J. ASSET PROT. 45, 49 (1996)); see also HAMILTON & BOOTH, *supra* note 142, at 251 (“For legal purposes, a proprietorship is not a separate entity.”).

149. Crusto, *Unconscious Classism*, *supra* note 140, at 226 (“[A] sole proprietorship has no separate identity from its owner.”); *id.* at 229 (identifying as other downsides the fact that the owner of a sole proprietorship cannot own property in the business’s name, obtain credit in the business’s name, sue or be sued in the business’s name, and segregate the business’s tax liability from the owner’s personal tax liability).

150. *Id.* at 221–22, 226–27; Crusto, *Extending the Veil*, *supra* note 141, at 390 (“[A] sole proprietor has unlimited personal liability for his business activities.”).

151. Crusto, *Extending the Veil*, *supra* note 141 (discussing the liability of the owner of a delivery business for a vehicular accident resulting in the pedestrian losing use of one leg).

### B. Partnerships<sup>152</sup>

Partnerships are created by two or more individuals operating as “co-owners of a business for profit.”<sup>153</sup> Nothing more is needed. No formal documents need to be filed with the state.<sup>154</sup> No agreement between the owners needs to be written.<sup>155</sup> The entity exists just by virtue of the working relationship of the co-owners.<sup>156</sup> This ability to form a partnership without government action may appeal to undocumented workers worried about outing themselves to government authorities.

In contrast to sole proprietorships, partnerships have some of the characteristics of an entity that is separate from its owners. Partnerships can sue and be sued; sole proprietorships do not share this feature.<sup>157</sup> Partnerships can buy and sell property in the partnership name; sole proprietorships cannot.<sup>158</sup> Finally, a partnership can continue to exist even if there is a change in the partnership’s members; sole proprietorships end when the owner ceases to do business.<sup>159</sup>

That said, the separateness of the partnership entity from its owners is not complete. Just like sole proprietors, partners bear unlimited personal liability for the debts and obligations of the partnership.<sup>160</sup> And, like sole proprietorships, partnerships are not taxed as a separate entity; profits and losses are reported as partners’ individual income.<sup>161</sup>

There are potential economic benefits to forming a partnership. Income can become less irregular when it is partnership-generated instead of purely individual-

152. For ease of reading, I use the word partnership in this Article to refer to what is formally known as a “general partnership.”

153. REVISED UNIF. P’SHIP ACT (RUPA) § 101(6) (UNIF. L. COMM’N 1997); *see also* *Partnership*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[A] voluntary association of two or more persons who jointly own and carry on a business for profit.”).

154. *See, e.g.*, CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 49 (7th ed. 2014) (“[F]ormation of a general partnership requires no . . . governmental action.”).

155. RUPA § 101(7) (noting partnership agreements can be written, oral, or implied).

156. As a result, it is possible to form a partnership without intending to form a partnership. *See, e.g.*, *Byker v. Mannes*, 641 N.W.2d 210, 215 (Mich. 2002) (concluding that the law “does not require ‘partners’ to be aware of their status as partners in order to have a legal partnership;” rather, “all the parties’ acts and conduct” are what determine the existence of a partnership).

157. *Crusto, Unconscious Classism*, *supra* note 140, at 234.

158. *Id.*

159. *Id.*

160. O’KELLEY & THOMPSON, *supra* note 154, at 50 (“[A]ll partners are jointly and severally liable for all obligations of the partnership and there is no limit on this potential personal liability.”).

161. *Tax Information for Partnerships*, IRS, <https://www.irs.gov/businesses/partnerships> [<https://perma.cc/X6ZC-4XE2>] (last updated Oct. 22, 2020).

driven. That is, a successful partnership<sup>162</sup> will generate its own business and its own clients, which can give the undocumented worker–partner greater stability in terms of compensation and hours. If any individual client walks away from the business due to the worker’s legal status or for any other reason, the diffusion of services among multiple clients lessens the harm associated with the loss of any one client. Similarly, while a client who discovers the legal status of a partner might exploit that knowledge—perhaps by not paying for services—that loss can be more readily absorbed because it will not represent the loss of the partnership’s sole source of income. In addition, partnerships can give the undocumented migrant an opportunity to charge higher rates for their skills: an undocumented accountant can charge the same rate as citizen accountants in town and an undocumented tailor could charge the same rate as citizen tailors. Moreover, while benefits will not be provided for the undocumented partner without cost, steady income increases the opportunity for undocumented workers to secure their own benefits.

Other benefits of a partnership come from the characteristics of the partnership itself, such as the number of owners of the business. When two or more individuals want to form a business, a partnership may be the way to go. Imagine a husband-and-wife catering team or brothers who run a laundry business. When more than one person needs to have equal authority to act in the business’s name, a partnership is a better option than a sole proprietorship.<sup>163</sup>

Significantly, partnerships also allow undocumented owners to partner with individuals who do have work authorization (whether citizens or noncitizens) to form a business without triggering IRCA obligations. That is because, according to IRS rules, partners are not considered employees of the partnership.<sup>164</sup> Partners are considered to be self-employed when they perform services for the partnership.<sup>165</sup>

Imagine two cousins who want to start a pet-sitting business together: Jenny, a U.S. citizen, and Zuzanna, an undocumented migrant. If Jenny started a

162. I do not suggest that this would be an easy task for every undocumented worker to form a successful partnership or any successful business. Clearly, for a recently arrived immigrant, language and cultural barriers might be insurmountable. *See, e.g.*, Rathod, *supra* note 147, at 180 (“[L]anguage barriers affect many individuals seeking to establish and grow small businesses.”); *id.* at 183 (“[C]ultural differences and xenophobia can present obstacles for immigrant entrepreneurs . . . .”); *see also* Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 967–68 (2006) (noting many barriers that face newly arrived workers including fear of deportation as well as lack of knowledge about workplace culture and workplace rights).

163. That same benefit is a downside when only one person wants to control a business: partnerships require two or more co-owners. Crusto, *Extending the Veil*, *supra* note 141, at 426. There is no mechanism for an undocumented (or documented) owner to get the benefits of the entity-like status of a partnership without adding a co-owner.

164. *Are Partners Considered Employees of a Partnership or Are They Considered Self-Employed?*, IRS: FREQUENTLY ASKED QUESTIONS, <https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-1> [<https://perma.cc/NA2B-W2F7>] (last updated Jan. 4, 2021).

165. *Id.*

sole proprietorship and hired Zuzanna to work for her, Jenny would be violating IRCA. If, however, Jenny and Zuzanna form a partnership (“J&Z Petz”) and both work for the benefit of their pet-sitting partnership, IRCA is not triggered because there is no employment relationship between Jenny and Zuzanna, nor is there an employment relationship between the partnership and Zuzanna. Individuals who hire J&Z Petz to watch their animals while out of town also do not run afoul of IRCA because J&Z Petz can be understood either to provide intermittent domestic labor or to work as an independent contractor—two avenues that work around the territory covered by IRCA.

This example is hardly far-fetched. According to the Center for American Progress, some 16.7 million people nationwide have at least one unauthorized family member living with them in the same household,<sup>166</sup> a situation known as “mixed-status families.” Partnerships facilitate the formation of what might be called “mixed-status businesses.”

No matter the immigration status of their partners, partnerships facilitate the ability of undocumented persons to work lawfully in the United States. Additionally, so long as the ultimate client is truly hiring the partnership as an independent contractor (as opposed to hiring the partnership in an effort to launder an employment relationship with the undocumented partners), the partnership’s client can avoid IRCA liability as well. The downside of the partnership is unlimited personal liability, which is precisely why many would-be-partnership formers should consider the alternative of forming corporations or LLCs instead.

### C. Corporations

Unlike sole proprietorships and partnerships, the formation of a corporation cannot happen by accident or without the involvement of the state. Corporations are formed when individuals draft articles of incorporation and file them with the designated official in their chosen state of incorporation.<sup>167</sup> The articles of incorporation can be quite bare-bones, often requiring nothing more than a valid business name, the number of shares the corporation will be authorized to issue, the name and address of a registered agent, and the names and addresses of those filing the articles.<sup>168</sup> After that, the corporation gets up and running with the election of directors to manage the business, the issuance of shares in exchange for money to run the business, and the adoption of bylaws to govern the business.<sup>169</sup>

Corporations, in contrast to sole proprietorships and partnerships, are separate legal entities from their owners (shareholders), policymakers (directors),

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166. Silva Mathema, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Mar. 16, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/> [https://perma.cc/8BL6-AEVY].

167. O’KELLEY & THOMPSON, *supra* note 154, at 158; *see also* MODEL BUS. CORP. ACT (MBCA) § 2.03(a) (A.B.A., amended 2002) (“[T]he corporate existence begins when the articles of incorporation are filed.”).

168. *See* MBCA § 2.02(a).

169. O’KELLEY & THOMPSON, *supra* note 154, at 159.

and day-to-day managers (officers).<sup>170</sup> These three categories of participants are distinct: The owners of a corporation pay money in exchange for stock, which represents their proportional financial stake in the corporate entity. Shareholders have the possibility of financial gains by selling stock that has increased in value<sup>171</sup> or by receiving dividends,<sup>172</sup> but they have no role in setting the big-picture goals or the day-to-day management of a corporation. Directors work collectively as members of a board of directors, governing by majority rule. Directors make the major policy decisions for a corporation<sup>173</sup> and hire the corporation's officers. Unless they purchase shares, directors are not owners, and unless they are hired to also serve as officers, directors do not engage in the day-to-day operations of the corporation.<sup>174</sup> Finally, officers run the business.<sup>175</sup> Unless they purchase stock, they are not owners.<sup>176</sup> And unless they simultaneously serve as directors, they do not make the highest-level policy and strategy decisions for the company.<sup>177</sup> In sum, shareholders own the corporation, directors make policy for the corporation, and officers run the corporation.

Undocumented migrants are free to become shareholders of a traditional corporation.<sup>178</sup> There are no alienage restrictions on traditional corporate ownership. Thus, it is possible for undocumented migrants to benefit from the growth of a business by becoming an owner through capital investment. But, as discussed above, shareholders have no right to work for the corporation unless hired as employees

170. *Id.* at 149; *see also Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“An entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.”).

171. HAMILTON & BOOTH, *supra* note 142, at 331–32.

172. *Id.* at 331. Dividends are periodic payments to shareholders.

173. *See, e.g.*, Delaware General Corporation Law (DGCL), DEL. CODE ANN. tit. 8, § 141(a) (2020) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .”).

174. Directors who also serve as officers are known as “inside” directors. Directors who do not also serve as officers are known as “outside” directors. *See, e.g.*, O’KELLEY & THOMPSON, *supra* note 154, at 151; *see also* Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 78 (2007) (“Different jurisdictions and corporate governance norms speak variously of directors who are ‘non-interested,’ ‘independent,’ ‘outside,’ ‘non-executive,’ ‘non-employee,’ and ‘disinterested.’”); *id.* at 79 (rejecting the varied terms in favor of the phrase “non-management” director which accurately conveys that “the director in question is not a member of the current senior management team”).

175. Megan Wischmeier Shaner, *Confronting New Market Realities: Implications for Stockholder Rights to Vote, Sell, and Sue*, 70 OKLA. L. REV. 1, 1–2 (2017).

176. O’KELLEY & THOMPSON, *supra* note 154, at 151.

177. *Id.* at 152 (noting that the chief executive officer of a corporation may also serve as the chair of the board of directors, though this can be controversial).

178. By “traditional” corporation, I mean a subchapter C corporation. Michael Mastman, Note, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 233 (2008) (noting IRCA does not prohibit undocumented migrants from owning stock).

thereof. And hiring an undocumented worker could subject the corporation to IRCA penalties. So, while owning stock is a passive mechanism for undocumented migrants to earn income, shareholder status does not provide a means for lawful work.

IRCA likely serves as a barrier to hiring unauthorized workers to serve as officers of a corporation. Officers are most frequently considered employees of the corporation.<sup>179</sup> The only exception to that general rule is for unpaid officers who perform no or only minor services for the corporation.<sup>180</sup> That exception is clearly unhelpful for undocumented individuals looking for lawful work. Thus, if officers are treated for purposes of IRCA enforcement in the same manner that they are generally treated—a situation not yet addressed in caselaw—the officer role would be problematic.

Directors, on the other hand, are not considered employees of the corporation.<sup>181</sup> Because of that, an undocumented director can do work on behalf of the corporation without triggering IRCA concerns. What would that work look like? One leading treatise lists the following traditional director roles: selecting senior management, establishing corporate procedures, reviewing or creating strategy, monitoring the company and its senior management, as well as evaluating corporate risk.<sup>182</sup> Directors are paid for these services.<sup>183</sup> And so, serving as a director of a corporation is one way in which an undocumented individual can lawfully work in the United States.

Readers at this point may question whether an undocumented person would really serve as the director of a corporation. After all, would that not require professional skills that an undocumented individual would be unlikely to possess? There are two responses. First, undocumented individuals might be highly skilled. Second, corporations and their directors are not limited to the highly skilled.

Addressing the first issue: whether undocumented workers can be highly skilled. One prominent example is Jose Antonio Vargas. He is the Pulitzer-prize winning journalist who outed himself as undocumented.<sup>184</sup> A filmmaker,<sup>185</sup> writer,<sup>186</sup> and frequent TV pundit, he is also the director of a corporation: Define American, Inc. Vargas established this corporation to create a legal way for him to

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179. *Paying Yourself*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/paying-yourself> [<https://perma.cc/2A3W-5C3P>] (last updated Oct. 16, 2020).

180. *Id.*

181. *See, e.g.*, *Necanicum Inv. Co. v. Emp. Dep't*, 345 Or. 138, 145 (2008) (holding corporate directors are not employees of the corporation).

182. GREGORY V. VARALLO ET AL., *FUNDAMENTALS OF CORPORATE GOVERNANCE: A GUIDE FOR DIRECTORS AND CORPORATE COUNSEL* 2 (2d ed. 2009).

183. *See, e.g.*, ABA CORP. L. COMM., *CORPORATE DIRECTOR'S GUIDEBOOK* 6 (7th ed. 2020) (“Director compensation should be commensurate with the time and effort required and the risk undertaken.”).

184. Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES (June 22, 2011), <https://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html> [<https://perma.cc/LU9K-ZG62>].

185. DOCUMENTED (Apo Productions & Janet Yang Productions 2013).

186. JOSE ANTONIO VARGAS, *DEAR AMERICA: NOTES OF AN UNDOCUMENTED CITIZEN* (2018).

work in the United States while remaining undocumented. And Vargas does not just work for his corporation; he employs multiple individuals who have the legal right to work in the United States.<sup>187</sup>

Vargas is not an outlier.<sup>188</sup> Consider when President Donald Trump tried to end work authorization<sup>189</sup> for more than 600,000 migrants holding Deferred Action for Childhood Arrivals (“DACA”)<sup>190</sup> and over 400,000 migrants holding Temporary Protected Status (“TPS”).<sup>191</sup> Those efforts were unsuccessful,<sup>192</sup> but the fact that so

187. Jose Antonio Vargas (@joseiswriting), TWITTER (Aug. 9, 2016, 9:50 PM), <https://twitter.com/joseiswriting/status/763205856259297281> [https://perma.cc/Y79Y-5H8Z] (“[M]y FB chat w/ one of my former employees (yes, undocumented immigrants CREATE jobs).”).

188. See, e.g., Dana H. Shultz, *Can an Undocumented Immigrant Form a Corporation?*, THE HIGH-TOUCH LEGAL SERVS. BLOG . . . FOR STARTUPS! (Sept. 8, 2011), <https://danashultz.com/2011/09/08/can-an-undocumented-immigrant-form-a-corporation/> [https://perma.cc/J9HK-9D4H] (noting that she has helped “dozens of foreign clients (non-citizens, no social security number)” form corporations).

189. As two scholars put it, the goal of the administration was to “*un-authorize* individuals who are currently authorized to live and work in the U.S.” Kati L. Griffith & Shannon Gleeson, *Trump’s ‘Immemployment’ Law Agenda: Intensifying Employment-Based Enforcement and Un-Authorizing the Authorized*, 48 SW. L. REV. 475, 478 (2019).

190. The U.S. Citizenship and Immigration Services notes that there are approximately 652,880 active DACA recipients as of September 30, 2019, with 25,990 renewal applications pending. See *Approximate Active DACA Recipients: As of September 30, 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_Population\\_Receipts\\_since\\_Injunction\\_Sep\\_30\\_2019.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Receipts_since_Injunction_Sep_30_2019.pdf) [https://perma.cc/Q5M7-WM3F] (last visited Jan. 10, 2021) (table). The Trump administration tried to end the DACA program. See *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1901–05 (2020) (outlining the history for DACA and explaining the Trump administration’s moves to end the program).

191. The Congressional Research Service estimated that, in August 2021, 320,000 individuals had TPS status in the United States. See Jill H. Wilson, CONG. RSCH. SERV., RS20844, *TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES* (2021), <https://fas.org/sgp/crs/homsec/RS20844.pdf> [https://perma.cc/Y2RV-DT8L] [hereinafter *TEMPORARY PROTECTED STATUS: OVERVIEW*]. The Trump administration sought to end TPS for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. Injunctions were put in place to prevent the implementation of those changes. See, e.g., *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [https://perma.cc/Y47A-XADR] (last updated Dec. 7, 2020) (identifying current litigation). If TPS coverage for citizens of those nations had ended, some 313,545 individuals would have lost their right to remain in the United States and their work authorization. See *TEMPORARY PROTECTED STATUS: OVERVIEW*, *supra*, at tbl. 1.

192. See *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. at 1913–15 (concluding the administration’s decision to rescind DACA was arbitrary and capricious and so violated the Administrative Procedure Act); *Update on Ramos v. Nielsen*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/update-on-ramos-v-nielsen> [https://perma.cc/E6NB-KKNJ] (last updated Dec. 7, 2020) (lawsuit resulted in the government reinstating the TPS it sought to revoke); *Update on Bhattarai v. Nielsen*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/update-on-bhattarai-v-nielsen> [https://perma.cc/T5F7-G978] (last updated Dec. 7, 2020) (same).

many individuals with current careers—from doctors<sup>193</sup> to business owners<sup>194</sup>—were faced with sudden loss of lawful employment evidences the fact that skilled undocumented workers are not rarities.<sup>195</sup>

The second issue is that directors need not have advanced degrees or professional skills. Incorporation is appropriate for many types of businesses, including our prior examples of pool cleaning, landscaping, and pet-sitting.

There are myriad benefits to the corporate form. Some benefits are the same as those that can be obtained with partnerships—a spreading-out of labor and risks that helps to create the potential for regular income, work stability, higher pay, the potential for benefits, and protection from exploitation. In addition, because the corporation is a distinct legal entity, it can do all the things partnerships can—sue and be sued, buy and sell property in the corporate name, and exist with new owners. But it can also do more: It can shield owners and managers from liability. This is because corporations are solely liable for their own obligations. Absent malfeasance, there is no personal liability for shareholders, directors, or officers for the

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193. See, e.g., Nina Shapiro, *Seattle Public Health Doctor Sues After Being Denied Green Card*, SEATTLE TIMES (May 13, 2020), <https://www.seattletimes.com/seattle-news/seattle-public-health-doctor-sues-after-being-denied-green-card/> [https://perma.cc/4XPM-ME5U] (doctor with TPS); Bridget Balch, *DACA Physicians Serve on COVID-19 Front Lines*, AAMC (June 18, 2020), <https://www.aamc.org/news-insights/daca-physicians-serve-covid-19-front-lines> [https://perma.cc/2M4G-RGN8] (providing an example of a doctor with DACA).

194. See, e.g., Michelle Rindels & Luz Gray, *For Vegas Business Owners, Fleeting Security of TPS Came After Surviving Horrors of Salvadoran War*, NEV. INDEP. (Apr. 29, 2018), <https://thenevadaindependent.com/article/for-vegas-business-owners-fleeting-security-of-tps-came-after-surviving-horrors-of-salvadoran-war> [https://perma.cc/D2MV-6A6C] (restaurateurs with TPS); *DACA by the Numbers*, U.S. CONG. JOINT ECON. COMM.: DEMOCRATS, [https://www.jec.senate.gov/public/\\_cache/files/308dfd48-3ec4-438d-8141-1558991321f0/daca-by-the-numbers.pdf](https://www.jec.senate.gov/public/_cache/files/308dfd48-3ec4-438d-8141-1558991321f0/daca-by-the-numbers.pdf) [https://perma.cc/2ZSQ-ZXEZ] (last visited Jan. 10, 2021) (“5% of DACA recipients are entrepreneurs and small business owners . . .”).

195. See also Héctor Tobar, *What the Future Holds for Undocumented Immigrants*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/opinion/trump-biden-immigration-reform.html> [https://perma.cc/V5AX-4HRF] (“I’ve met undocumented business owners and Harvard graduates.”); JEFFREY S. PASSEL, PEW HISP. CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006), <https://www.pewresearch.org/wp-content/uploads/sites/5/reports/61.pdf> [https://perma.cc/JM36-BFWP] (concluding that as of March 2005, 20% of computer hardware engineers were undocumented); see also Nina Roberts, *Undocumented Entrepreneurs: How They Started Businesses Without Papers*, DOCUMENTED (Oct. 8, 2018), <https://documentedny.com/2018/10/09/undocumented-entrepreneurs-how-they-started-businesses-without-papers/> [https://perma.cc/2YS5-FFRX] (noting the CEO of CarrierEQ, Inc.—doing business as AirFox, “the bank for the poor 2.0”—is a DACA recipient from Brazil); Jie Zong et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, MIGRATION POL’Y INST. 6–8 (Nov. 2017), <https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf> [https://perma.cc/F65W-US7X] (noting many DACA recipients work in professional jobs and identifying the wide range of employment sectors where they work).



corporation's debts and obligations.<sup>196</sup> This is a huge advantage and a frequent reason why businesses choose to form as corporations and not as partnerships.<sup>197</sup>

There are drawbacks to the corporate form, however, particularly for undocumented migrants interested in incorporating their sole proprietorships. It is possible to create a corporation with a single shareholder<sup>198</sup> or a single director.<sup>199</sup> That is, if Luis of Luis's Landscaping wanted to incorporate, he could do so. He could be the sole shareholder and he could serve as the company's sole director. This would allow him to avoid the unlimited personal liability associated with partnerships and sole proprietorships.<sup>200</sup>

This, however, is not a very good idea. For one, remember that as a corporation, Luis's Landscaping Inc. would be considered a separate entity from Luis himself. If Luis's Landscaping Inc. relies on Luis to run the corporation, Luis is effectively an officer and employee of Luis's Landscaping Inc., and that employment would likely be found to violate IRCA. I use the word "likely" here because there is no caselaw on this issue.

Beyond the implications of IRCA, this set-up would generally be financially disadvantageous for Luis. The income earned by his landscaping company would be taxed at the corporate tax rate, and any dividends he receives as the sole shareholder would be taxed a second time on his personal income taxes. In short, the same money would be taxed twice, reducing Luis's total personal income.<sup>201</sup>

196. Shareholders can be sued only by "piercing the corporate veil," which can happen if the "corporate form is employed to evade an existing obligation, circumvent a statute, perpetrate fraud, commit a crime, or work an injustice." O'KELLEY & THOMPSON, *supra* note 154, at 606. Directors and officers are subject to suit if they violate the fiduciary duties owed to the corporation. *See, e.g.,* VARALLO ET AL., *supra* note 182, at 37–75 (outlining the duties and liabilities of individual board members); R. Franklin Balotti & Megan W. Shaner, *Safe Harbor for Officer Reliance: Comparing the Approaches of the Model Business Corporation Act and Delaware's General Corporation Law*, 74 LAW & CONTEMP. PROBS. 161, 163–165 (2011) (outlining the fiduciary duties of corporate officers and discussing whether officers should receive a safe harbor when they take actions in reliance on other individuals and resources).

197. There are also tax consequences to forming a corporation. As a separate legal entity, corporations are taxed for their own earned income. When that income is distributed to owners, via shareholder dividends, that same income is taxed a second time as individual income. *See, e.g.,* Walter Hellerstein, Georg W. Kolfer & Ruther Mason, *Constitutional Restraints on Corporate Tax Integration*, 62 TAX L. REV. 1, 2 (2008).

198. HAMILTON & BOOTH, *supra* note 142, at 290.

199. VARALLO ET AL., *supra* note 182, at 14.

200. *See supra* notes 148–151, 160 and accompanying text. *See also* Crusto, *Extending the Veil*, *supra* note 141, at 422–23 ("Small businesses often incorporate to shield themselves from personal exposure resulting from business liabilities."). *But see* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001) (discussing the circumstances under which, by "piercing the corporate veil," a "controlling" shareholder may be held liable for the corporation's liabilities).

201. *See, e.g.,* Michael S. Schadewald & Tracy A. Kaye, *Source of Income Rules and Treaty Relief from Double Taxation within the NAFTA Trading Bloc*, 61 LA. L. REV. 353,

Interestingly, there is a business entity that solves one of those two problems, but it is unavailable to Luis. What is known as a subchapter S corporation (“S Corp”) allows an individual to reap the benefits of limited liability while continuing to be taxed like a sole proprietorship.<sup>202</sup> However, it is an entity that is not available to noncitizens.<sup>203</sup> Yet, even if an S Corp were available to Luis, this corporate form would not solve his underlying IRCA problem because Luis’s Landscaping would still be relying on Luis to run the business, effectively making Luis an employee. And that employment would likely violate IRCA.

In sum, undocumented individuals can passively invest in corporations as shareholders. They can also serve as directors without incurring IRCA liability. However, incorporation of the sole proprietorship will not create an opportunity for lawful work for undocumented persons because it would introduce IRCA liability for the corporation as an entity improperly employing an undocumented worker.

#### D. LLCs

Limited liability companies (“LLCs”) are a relative newcomer to the business entity scene. They were invented in 1977 by enterprising individuals in Wyoming eager to get the benefits of a partnership—including flow-through taxation<sup>204</sup>—while also reaping the principal benefit of the corporate form—limited liability.<sup>205</sup> While in existence for several decades, LLCs did not truly rise to prominence until 1997 when the IRS determined that it would tax such entities on the basis of their chosen form without investigating how the business was actually run.<sup>206</sup> That is, those forming an LLC can elect to have it taxed like a partnership, with flow-through taxation, or like a corporation, with the entity subject to its own taxation.<sup>207</sup>

Forming an LLC is not difficult. Doing so requires picking a name not already in use,<sup>208</sup> appointing a registered agent, and then filing formation documents with the state’s division of corporations or secretary of state’s office along with a registration fee.<sup>209</sup> Formation documents are bare-bones in nature. In Delaware, a

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373 (2001) (“For federal income tax purposes, C corporations are subject to double taxation in that the corporation is taxed on its taxable income, and the shareholders are also taxed when the after-tax earnings are distributed.”).

202. Crusto, *Extending the Veil*, *supra* note 141, at 423–24.

203. *Id.*

204. *See supra* note 160 and accompanying text. Flow-through taxation means that the LLC does not pay an entity tax in the way that a corporation does. Its profits and losses flow through to the LLCs’ owners: its members. This avoids the problems of double taxation that happen with a single-owner corporation that is not an S corporation. *See supra* note 197 and accompanying text.

205. 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES 5 (2d ed. 2016).

206. O’KELLEY & THOMPSON, *supra* note 154, at 533.

207. RIBSTEIN & KEATINGE, *supra* note 205, at 10 (noting the election extends to treatment as a Subchapter S corporation, a tax-exempt entity, or the LLC may be disregarded entirely for tax purposes).

208. *Id.* at 159–61 (outlining the various rules regarding the naming of LLCs).

209. HAMILTON & BOOTH, *supra* note 142, at 264; RIBSTEIN & KEATINGE, *supra* note 205, at 139.

certificate of formation must state the name of the LLC and the address of its registered agent.<sup>210</sup> That's it.<sup>211</sup> Registration fees are also not onerous. For example, it costs \$90 to form an LLC in Delaware<sup>212</sup> and just \$50 to form one in Colorado.<sup>213</sup>

LLCs do not have shareholders. Instead, they have members. LLCs also do not have directors. Instead, they have managers. In contrast to the operation of corporations, the ownership and management roles in an LLC can be combined in the same persons, who are called member-managers. The legal default for LLCs is that the members will manage the business.<sup>214</sup> The direct control that LLC members exert on the company aligns most closely with the relationship of partners to the partnership.<sup>215</sup> And if LLC members act as bona fide partners, participating in the management and control of the LLC, then they will not be considered employees of the LLC.<sup>216</sup> Just like partners are not employees of a partnership, member-managers are not employees of an LLC.

The fact that member-managers of an LLC are not employees of the company is a huge advantage both for undocumented member-managers and for the LLC. Recall that IRCA imposes obligations on employers of undocumented migrants.<sup>217</sup> Without an employment relationship between the LLC and its member-managers, IRCA should impose no obligations on the LLC with regards to undocumented member-managers. Consistent with the above discussion of corporations, it is not possible to offer a more definitive statement as to how immigration-enforcement agencies might interpret the intersection of IRCA and LLC formation. There is no caselaw on the matter.<sup>218</sup> But assuming courts respect the standard interpretation of the relationship between member-managers and their

210. Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, § 18-201 (2018).

211. As Professor Franklin Amarante has noted, while straightforward, LLC filing materials are almost always exclusively available in English. He proposes making such materials available in multiple languages in order to facilitate the creation of LLCs by noncitizens. Eric Franklin Amarante, *The Unsung Latino Entrepreneurs of Appalachia*, 120 W. VA. L. REV. 773 (2018); see also Rathod, *supra* note 147 (noting language barriers to immigrant entrepreneurship).

212. *Division of Corporations Fee Schedule*, DEL. DEP'T OF STATE (Aug. 1, 2019), <https://web.archive.org/web/20190828140002/https://corpfiles.delaware.gov/Augustfee2019.pdf> [<https://perma.cc/KFU9-AH4K>].

213. *Fee Schedule*, COLO. SEC'Y OF STATE JENA GRISWOLD (Feb. 5, 2019), [https://www.sos.state.co.us/pubs/info\\_center/fees/business.html](https://www.sos.state.co.us/pubs/info_center/fees/business.html) [<https://perma.cc/6QYG-Y3ZG>].

214. RIBSTEIN & KEATINGE, *supra* note 205, at 11. The default is known as a "member-managed" LLC. In the alternative, by agreement an LLC may be "manager-managed" in which case the ownership and management roles are more distinct, like a corporation.

215. *Id.* at 13.

216. O'KELLEY & THOMPSON, *supra* note 154, at 553.

217. See *supra* Part I (outlining employers' obligations under IRCA).

218. The closest case on point is *Universal Contracting, LLC v. Utah Department of Commerce*, in which the plaintiff LLC offered an unsupported hearsay statement that an official from the U.S. Department of Homeland Security told its manager that it could not check its members names with the federal E-Verify system because the members were not employees. 69 F. Supp. 3d 1225, 1241 (D. Utah 2014).

LLC, IRCA liability will not attach to the work of LLC member-managers. This sets LLCs apart from corporations, which, as explained in Section III.C, are likely liable for hiring undocumented officers and employees.

Another benefit to the relationship between the LLC and its member-managers is the opportunity for U.S. citizens, migrants with work authorization, and undocumented migrants to work together. As with partnerships, an LLC has the opportunity to become a “mixed-status business,” with members of different immigration status working side by side without IRCA penalties.

Not only can LLCs be mixed-status businesses, such companies need not disclose this fact to any governmental authority. While state formation laws universally require LLCs to identify an in-state agent for service of process against the LLC,<sup>219</sup> many states do not require any disclosure of the members of an LLC.<sup>220</sup> Thus, it is possible to form an LLC with undocumented members and lawfully avoid disclosing that fact publicly. As a result, LLCs can, for example, use the courts to sue nonpaying clients for monies owed without undocumented member-managers exposing their immigration status.<sup>221</sup>

While the employment relationship of member-managers to the LLC closely aligns with the employment relationship of partners to the partnership, there are many reasons why LLCs are preferable to partnerships. Most significant among them, limited liability companies, as their name implies, enjoy limited liability.<sup>222</sup> If something goes wrong in the course of the LLC’s business, a claimant can recover from the LLC, but the LLC’s members and managers will not be personally liable solely because of their status as members or managers.<sup>223</sup> Recall Jonathan, the Luis’s Landscaping employee who hit a pedestrian on the way to a job. If Luis formed his company as an LLC, the injured pedestrian would be entitled to recover from Luis’s Landscaping LLC, but Luis would not have to liquidate his personal assets to pay for the pedestrian’s claims. The LLC form enables noncitizens to protect their personal assets from potentially catastrophic claims.

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219. John D. Jackson & Alan W. Tompkins, *Corporations and Limited Liability Companies*, 47 SMU L. REV. 901 (1994) (discussing LLC formation in multiple states).

220. See, e.g., Eric Franklin Amarante, *The Perils of Philanthrocapitalism*, 78 MD. L. REV. 1, 58 n.380 (2018) (“[E]ight U.S. states, including Delaware, Wyoming, and New Mexico, don’t even require LLC founders to disclose the identities of their managers or ‘members’ . . .”). Other states require disclosure of LLC members but allow those members themselves to be LLCs, a practice that “easily obscures even this minimal amount of information.” *Id.* at 58–59.

221. Cf. David P. Weber, *Halting the Deportation of Businesses: A Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 784 (2009) (“Whether there is a breach of contract complaint, lease issue, trademark infringement or other legal dispute, most, if not all, undocumented entrepreneurs are willing to accept monetary losses to avoid the disclosure of their immigration status rather than risk removal and pursue or defend any just claims they may have in court.”).

222. HAMILTON & BOOTH, *supra* note 142, at 262.

223. 2 RIBSTEIN & KEATINGE, *supra* note 205, at 12. As with corporations, see *supra* notes 196–197 and accompanying text, claimants may be able to reach the assets of LLC members and managers if they are engaged in malfeasance. 2 RIBSTEIN & KEATINGE, *supra* note 205, at 12–19 (discussing “veil-piercing” of LLCs).

Another significant benefit of forming an LLC is taxation. Traditionally, LLCs are subject to pass-through taxation.<sup>224</sup> This means that profits from the LLC flow through to the LLC members as distributions and are taxed as part of the members' income. This stands in contrast to corporations, which are taxed once at the corporate level, and then shareholders are taxed a second time on the profits they receive from the corporation itself.<sup>225</sup> So, whereas operating as Luis's Landscaping Inc. would reduce Luis's after-tax income, operating as Luis's Landscaping LLC would not.

There are many different LLC forms. Two particular sorts—single-member LLCs and worker-cooperative LLCs—are addressed in greater detail below as they may be of particular interest to undocumented owners.

### 1. *Single-Member LLCs*

An LLC may have just one member.<sup>226</sup> Such an LLC is known as a single-member LLC. This is a huge benefit to the undocumented worker who might otherwise operate as a sole proprietor. A single-member LLC allows an undocumented sole proprietor to establish a separate business entity that would insulate the owner's personal assets from LLC liabilities. That is, a single-member LLC gets the benefit of total control over the business that would exist in a sole proprietorship coupled with the limited liability of an LLC. Moreover, since the LLC is subject to pass-through taxation, the single-member LLC is a better financial choice than incorporation of the sole proprietorship. Finally, there are no alienage restrictions on single-member LLCs, which is a difference with subchapter S corporations.<sup>227</sup>

Single-member LLCs have been used as a vehicle for structuring work and business transactions by a number of undocumented persons. Undocumented workers of all types have formed single-member LLCs—from graphic artists<sup>228</sup> to political consultants.<sup>229</sup>

### 2. *Worker-Cooperative LLCs*

Another LLC form merits additional consideration: the worker-cooperative LLC. These LLCs are not a form of business entity typically addressed in a law-school course on corporations or business associations.<sup>230</sup> Even many transactional

224. HAMILTON & BOOTH, *supra* note 142, at 262.

225. *See supra* note 201 and accompanying text.

226. RIBSTEIN & KEATINGE, *supra* note 205, at 142.

227. *See supra* notes 202–203 and accompanying text.

228. Cindy Carcamo, *Immigrants Lacking Papers Work Legally—as Their Own Bosses*, L.A. TIMES (Sept. 14, 2013), <https://www.latimes.com/nation/la-xpm-2013-sep-14-la-na-ff-immigration-business-20130915-story.html> [<https://perma.cc/F6GN-T8LK>].

229. Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and Their Lawyers)*, 61 B.C. L. REV. 1323, 1356 (2020).

230. Gowri J. Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE, GENDER & SOC. JUST. 206, 223 (2018). I'll admit that as a Business Associations professor for two years, it's a topic that I never once mentioned. Nor is the topic covered in the textbook that I utilized: O'KELLEY & THOMPSON, *supra* note 154.

attorneys are unfamiliar with the concept.<sup>231</sup> But the entity holds particular promise for undocumented immigrants seeking opportunities for work.

The idea behind worker-cooperative LLCs is this: a group of workers engaged in some form of low-income or unskilled work join together to form a member-managed LLC.<sup>232</sup> After its formation, the LLC can take on additional member-managers through an application process. If accepted, those new member-managers make an initial capital contribution in order to become legal co-owners of the LLC.<sup>233</sup> The LLC goes out and establishes independent-contractor relationships with outside individuals and entities pursuant to which LLC member-managers will perform services for the outside individuals or entities. In return, member-managers receive distributed profits from the LLC in lieu of wages for their work.<sup>234</sup> All member-managers democratically participate in the LLC's management—voting on whom to accept and expel as LLC member-managers, what clients to take on, and how to spend LLC monies.<sup>235</sup>

The concept is easier to comprehend when discussed in an industry that has embraced this form: home cleaners.<sup>236</sup> A group of home cleaners come together to form an LLC. By actively participating in the management of the LLC, no cleaners become employees of the LLC itself; thus, the LLC and its member-managers avoid IRCA liability.<sup>237</sup> The LLC then solicits work from outside individuals and entities and sends member-managers to perform that work.<sup>238</sup> In this manner, the outside individuals and entities that contract with the LLC do not ultimately employ the workers. They hire the LLC as an independent contractor to get the work

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231. Krishna, *supra* note 230, at 223.

232. One excellent resource on worker-cooperatives is Scott L Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181 (1999).

233. *Id.* at 186.

234. *Id.*

235. *Id.* at 185–86.

236. *See id.* at 191–94 (discussing the creation of such a cooperative of domestic cleaners); *see also* Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 86–95 (2000) (discussing domestic service cooperatives).

237. Krishna, *supra* note 230, at 217 (“As co-owners of the business with equal control, the worker-owners do not have an employment relationship vis-à-vis the cooperative, and thus do not require work authorization.”). Interestingly, some states have created worker-cooperative corporations. *See, e.g.*, Assemb. 816, 2015–2016 Leg., Reg. Sess. (Cal. 2015), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB816](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB816) [<https://perma.cc/5TG9-88VQ>] (California’s worker-cooperative corporation law); *see also* *Business Structure Comparison*, UW CTR. FOR COOPS., <https://uwcc.wisc.edu/about-coops/business-structure-comparison/> [<https://perma.cc/J7Z5-9FSL>] (“In some states, cooperatives are incorporated as a type of nonprofit corporation.”). However, given the employment relationship between corporations and their employees, IRCA is a barrier to the development of worker-cooperative corporations by undocumented migrants. *See, e.g.*, Cummings, *supra* note 232, at 203 (recognizing this barrier); *id.* at 207–08 (recognizing a worker-cooperative LLC can sidestep employment-based immigration laws).

238. Cummings, *supra* note 232, at 205–06.

accomplished, thus insulating the ultimate beneficiaries of the work from IRCA liability.<sup>239</sup>

The worker-cooperative LLC is particularly attractive for low-wage earners. A worker-cooperative LLC has the opportunity to create a “reliable customer pool,”<sup>240</sup> thus eliminating the irregularity of employment outside of IRCA. The LLC can create a customer pool through marketing.<sup>241</sup> In addition, the LLC can filter clients—for example, prioritizing homeowners looking for full-day work over homeowners seeking only half-day help.<sup>242</sup>

In addition, by bringing together a number of workers in a particular location in a particular field, the worker-cooperative LLC can mimic collective bargaining through a labor union.<sup>243</sup> If a significant number of house cleaners in West L.A. belong to the cooperative, they may be in a stronger position to charge higher rates than any individual cleaner working on their own.<sup>244</sup>

Higher wages may also result from other actions of the LLC. If the LLC trains its member-managers to work in a consistent manner (perhaps including dress, materials used, and frequency and manner of communicating with clients), clients may perceive the work as more professional.<sup>245</sup> And professional services come at a premium.

In addition, with enough member-managers, worker-cooperative LLCs may have the ability to purchase group benefits such as health insurance.<sup>246</sup> This is a huge benefit that eludes sole proprietors and single-member LLCs. The LLC can establish other benefits as well, such as sick leave.<sup>247</sup> And the LLC can limit exploitation of undocumented persons because the LLC itself can sue to enforce payment obligations.<sup>248</sup>

As legal scholar Scott Cummings noted in his exploration of the worker-cooperative LLC for low-income workers, the requirement that member-managers take an active management role in the LLC has significant potential to expand the skill-base of its member-managers.<sup>249</sup> Because the worker-cooperative LLC requires workers to run the LLC, “the workers commit themselves to a continuing process of self-education in the development of business-related skills such as

239. Smith, *supra* note 236, at 93–94; *see also supra* Section II.B.

240. Smith, *supra* note 236, at 90–91.

241. Cummings, *supra* note 232, at 193–94 (noting a worker cooperative whose marketing strategy was “targeted to attract those clients willing to pay a premium to hire domestic workers in a socially responsible manner” that promoted “economic justice for low-income immigrant women” and “a living wage”); *see also* Smith, *supra* note 236, at 87 (discussing the marketing of worker cooperatives through “white, middle-class rhetoric”).

242. Cummings, *supra* note 232, at 193.

243. *Id.* at 186–87.

244. *Id.*

245. Smith, *supra* note 236, at 88–89 (discussing trainings regarding cleaning standards, cleaning products, and worker competence).

246. Cherry, *supra* note 120, at 789.

247. *Id.* at 799.

248. Cummings, *supra* note 232, at 187.

249. *Id.*

accounting, marketing, management, and literacy.<sup>250</sup> In his case study of an L.A.-based group of undocumented cleaners,<sup>251</sup> Cummings explored how a community-based organization supported the startup of a worker-cooperative LLC by training an initial group of women in the business, leadership, and employment skills necessary to run the new business. Once trained, these leaders could create their own training programs for new member-managers to facilitate the growth and effective management of the LLC entity.<sup>252</sup>

To the extent worker-cooperative LLCs have been discussed in the literature, the discussion has mostly concerned domestic cleaning work.<sup>253</sup> The worker-cooperative LLC model, however, is not limited to such work.<sup>254</sup> When President Trump threatened to end TPS for hundreds of thousands of workers in the United States,<sup>255</sup> one industry that would have been greatly affected is home health care. Many of the aides who assist the country's elderly and disabled have work authorization under TPS.<sup>256</sup> Had these individuals lost their work authorization but remained in the United States, worker-cooperative LLCs focused on home-

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250. *Id.* But see Smith, *supra* note 236, at 91 (expressing concern that undocumented workers may be uninterested in the worker-cooperative LLC because of the management obligations that encroach on time that could be spent on additional cleaning jobs).

251. Cummings, *supra* note 232, at 191–94.

252. Professor Miriam Cherry suggests that the trained “office manager” for the LLC worker cooperative may be able to assist lower-skilled members with filing their tax returns such that “[i]nstead of having a potential tax problem along with an immigration problem, undocumented members will face only immigration problems.” Cherry, *supra* note 120, at 801.

253. See Cummings, *supra* note 232, at 191–94; see also MINSUN JI & TONY ROBINSON, IMMIGRANT WORKER OWNED COOPERATIVES: A USER’S MANUAL 8–11 (2012), [https://institute.coop/sites/default/files/resources/362%202012\\_Minsun%20Ji\\_Worker%20Co-op%20Manual.pdf](https://institute.coop/sites/default/files/resources/362%202012_Minsun%20Ji_Worker%20Co-op%20Manual.pdf) [<https://perma.cc/8PTF-BT4Z>] (discussing Denver’s Green Cleaning for Life, LLC); *id.* at 14–15, 28–29 (highlighting cleaning cooperatives in California, Massachusetts, and New York).

254. See, e.g., Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 326–37 (2014) (exploring historical examples of worker cooperatives in the construction, tree-planting, cab-driving, and meat-packing industries); Iliana Perez, *Life After College: A Guide For Undocumented Students*, in IMMIGRANTS RISING 36–37, <https://www.marquette.edu/diversity/documents/undocuguide-life-after-college-guide.pdf> [<https://perma.cc/ZM5T-QZNE>] (last visited Feb. 15, 2021) (identifying other cooperatives including organic farmers, educational software developers, personal tutors, and landscapers); Ji & ROBINSON, *supra* note 253, at 14 (identifying a sewing cooperative in North Carolina).

255. See *supra* note 191 and accompanying text.

256. See, e.g., Melissa Bailey, *As Trump Targets Immigrants, the Elderly Brace to Lose Caregivers*, NBC NEWS (Mar. 26, 2018), <https://www.nbcnews.com/health/health-care/trump-targets-immigrants-elderly-brace-lose-caregivers-n860046> [<https://perma.cc/2R53-U9EG>]; see also Kati L. Griffith, Shannon Gleeson & Vivian Vázquez, *Immigrants in Shifting Times on Long Island, NY: The Stakes of Losing Temporary Status*, 97 DENV. L. REV. 743 (2020) (assessing data from in-depth interviews with 42 TPS holders, half of whom were employed in home care, about the Trump administration’s threat to their work authorization).



healthcare aides would have presented a unique opportunity for lawful work while undocumented.

Notably, it is state law, rather than federal law, that presents the greatest hurdle to the formation and operation of worker-cooperative LLCs. Utah, for example, amended the state’s Construction Trades Licensing Act to penalize unincorporated entities by taking away their construction licenses if their owners were not lawfully present in the United States.<sup>257</sup> An LLC comprised of 900 members in Utah’s construction trade, including several undocumented members, argued that the state law was preempted by IRCA.<sup>258</sup> The federal district court in Utah, however, did not find the law preempted.<sup>259</sup> Thus, if LLC member–managers wish to undertake work that requires a state construction license, they cannot do so in Utah. Other states have no such restrictions.<sup>260</sup>

#### **IV. THE IMPLICATIONS OF BUSINESS ENTITY SOLUTIONS**

Creating a business entity for employment purposes has the potential to significantly raise up the working conditions of millions of noncitizens in this country without work authorization. Business entities can insulate undocumented workers from the exploitation that is rampant when working as an individual.<sup>261</sup> And lawful work within business entities will almost certainly increase individual income.<sup>262</sup>

Lawful work while undocumented also has the potential to protect future immigration benefits for individuals. The United States has a process whereby certain migrants can adjust their status to become lawful permanent residents (“LPR”), also known as green-card holders, which is a status predicate to U.S.

257. UTAH CODE ANN. §§ 58-55-401(2)(a), 58-55-501(23) (West 2021).

258. *Universal Contracting, LLC v. Utah Department of Commerce*, 69 F. Supp. 3d 1225, 1227–28, 1231 (D. Utah 2014).

259. *Id.* at 1237–45. In contrast, the Tenth Circuit found the Oklahoma Taxpayer and Citizen Protection Act of 2007, which would have required contracting entities either to verify the work eligibility of their individual independent contractors or withhold certain taxes from those contractors, to be impliedly preempted by federal law. *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 750 (10th Cir. 2010).

260. *See supra* note 146 (noting that New Mexico does not require proof of immigration status for any professional licenses).

261. *Cherry, supra* note 120, at 803 (noting the “net economic effects” for immigrant workers who form worker-cooperative LLCs).

262. LISA CHRISTENSEN GEE ET AL., INST. ON TAX’N & ECON. POL’Y, UNDOCUMENTED IMMIGRANTS’ STATE AND LOCAL TAX CONTRIBUTIONS 4 (Mar. 2017), <https://itep.sfo2.digitaloceanspaces.com/ITEP-2017-Undocumented-Immigrants-State-and-Local-Contributions.pdf> [<https://perma.cc/R9PU-DB7S>] (“Multiple studies have shown that legal immigrants have higher wages than undocumented immigrants, thus gaining legal status could lead to a boost in wages.”); *see also* Craig Wesley Carpenter & Scott Loveridge, *Immigrants, Self-Employment, and Growth in American Cities*, 42 J. REG’L ANALYSIS & POL’Y 100, 101 (2017) (“[S]elf-employment has a statistically significant and positive impact on median income . . . .”); Pierre Azoulay et al., *Immigration and Entrepreneurship in the United States*, MIT 3 (Sept. 2, 2020), <https://mitsloan.mit.edu/shared/ods/documents/?PublicationDocumentID=7555> [<https://perma.cc/P8GQ-WRS3>] (“Firms maximize profits.”).

citizenship.<sup>263</sup> But the law bars those who have accepted “unauthorized employment” from receiving this benefit.<sup>264</sup> Only those who are in a position to obtain LPR status on the basis of being an “immediate relative” of their visa sponsor—the children, spouses, and parents of a U.S. citizen<sup>265</sup>—are exempt from this bar.<sup>266</sup> Thus, lawful work through business entities has more than just economic importance for the individual worker.

Beyond the benefits to individuals, the formation of business entities can benefit the U.S. economy as a whole. Consider just the issue of wage theft: when an employer withholds pay from an undocumented worker.<sup>267</sup> If working within a business entity can prevent wage theft, the fiscal benefits are significant. As Professors Jennifer Lee and Annie Smith estimate, wage theft has cost “the federal government \$113 million in federal income taxes and \$238 million in payroll taxes, as well as \$8 million (NY) and \$14 million (CA) in state taxes.”<sup>268</sup> Those are 2011 figures.<sup>269</sup> Adjusted to 2019 dollars, those amounts soar to \$129 million in federal income taxes, \$271 million in payroll taxes, and \$9 million (NY) and \$16 million (CA) in state taxes.<sup>270</sup> Federal and local governments can use this increased tax revenue to improve the lives of their citizens.<sup>271</sup>

Wage theft not only affects the tax base, it can leave the underpaid worker with less individual income and can systematically push wages down for similarly skilled workers.<sup>272</sup> If business entities can eliminate wage theft and these important side-effects, the individual wealth of all affected workers will increase. And economists hold that individual wealth fuels economic growth.<sup>273</sup> That is because as individual wealth increases, so does the individual’s consumption of goods and services purchased from firms, which, in turn, use those sales to pay their workers’ wages and rents as well as profits to the firms’ owners.<sup>274</sup> It is the back and forth of

263. See 8 U.S.C. § 1255 (setting out the requirements for adjustment of status); Kit Johnson, *A Citizenship Market*, 2018 U. ILL. L. REV. 969, 980 (2018) (explaining that lawful permanent resident and green card holder are synonyms and that LPR status is a predicate to U.S. citizenship).

264. 8 U.S.C. § 1255(c)(2).

265. *Id.* § 1151(b)(2)(A)(i) (defining the term “immediate relative”).

266. *Id.* § 1255(c)(2).

267. See *supra* note 118 (discussing the problem of wage theft).

268. Lee & Smith, *supra* note 118, at 766.

269. *Id.*

270. *What Is a Dollar Worth? Inflation Calculator App*, FED. RESERVE BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator> [<https://perma.cc/VH5E-D9NW>] (last visited Feb. 15, 2022) (calculating inflation using Bureau of Labor Statistics monthly consumer price index data).

271. See, e.g., N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 237–38 (6th ed. 2012) (listing common federal spending priorities); *id.* at 241 (listing common state spending priorities); see also *id.* at 233–34 (“When the government remedies an externality (such as air pollution), provides a public good (such as national defense), or regulates the use of a common resource (such as fish in a public lake), it can raise economic well-being.”).

272. Lee & Smith, *supra* note 118, at 766.

273. TYLER COWEN & ALEX TABARROCK, *MODERN PRINCIPLES: MACROECONOMICS* 7 (2d ed. 2013).

274. N. GREGORY MANKIW, *PRINCIPLES OF MACROECONOMICS* 197 (6th ed. 2012).

money from individuals to firms that is the basis for measuring a nation’s gross domestic product,<sup>275</sup> the figure by which economists measure the economic well-being of a nation.<sup>276</sup>

Another way in which the formation of business entities by unauthorized workers can help the U.S. economy is through employment. While it is unlawful for employers to hire undocumented workers, it is not unlawful for undocumented employers to hire workers with employment authorization. Businesses owned by undocumented migrants employ U.S. workers—creating new jobs<sup>277</sup> and expanding labor demand.<sup>278</sup> Job creation has a major impact on the U.S. economy as a whole.<sup>279</sup> As Senator Spencer Abraham, co-founder of the Federalist Society,<sup>280</sup> said, speaking in the context of immigration generally: “We cannot have a dynamic economy without entrepreneurship, nor jobs without employers. In short, we cannot have wealth without the wealth creators.”<sup>281</sup>

Money from undocumented-owned business entities flows into the economy in more ways than through job creation. Undocumented owners of business entities are likely to pay the taxes that IRCA-violating employers are not, including Social Security, unemployment, and workers compensation for their

275. *Id.*

276. *Id.* at 212–13.

277. *See, e.g.,* Julia Boorstin, *Illegal Entrepreneurs*, CNN MONEY (July 1, 2005), [https://money.cnn.com/magazines/fsb/fsb\\_archive/2005/07/01/8265279/](https://money.cnn.com/magazines/fsb/fsb_archive/2005/07/01/8265279/) [<https://perma.cc/L7H6-VFLR>] (estimating that two-thirds of workers at the garment factory owned by an undocumented employer have legal authorization to work); Vargas, *supra* note 187 (“[M]y FB chat w/ one of my former employees (yes, undocumented immigrants CREATE jobs.)”); Carcamo, *supra* note 228 (noting the undocumented owner of an LLC hires staff); Roberts, *supra* note 195 (noting the undocumented—though work-authorized—CEO of Airfox has created numerous jobs); *see also* *Getting the Job Done: How Immigrants Expand the U.S. Economy*, KNOWLEDGE@WHARTON (Sept. 8, 2020), <https://knowledge.wharton.upenn.edu/article/how-immigrants-expand-the-u-s-economy/> [<https://perma.cc/EL2M-T3UE>] (“[I]mmigrant entrepreneurs have a more profound impact on overall labor demand by starting companies that hire new workers, creating a positive ripple-effect on the economy.”); Kosten, *supra* note 8 (“Business started by immigrant entrepreneurs create millions of jobs.”).

278. Azoulay et al., *supra* note 262, at 1.

279. *See, e.g.,* Jennifer Erickson, *Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Economic Policy*, CAP (May 7, 2014), <https://www.americanprogress.org/issues/economy/reports/2014/06/19/92398/drivers-of-job-creation/> [<https://perma.cc/CEB3-TPMU>] (identifying policies to fuel short-term and long-term job creation in order to strengthen U.S. economic growth); *see also* Josh Bivens, *Recommendations for Creating Jobs and Economic Security in the U.S.*, ECON. POL’Y INST. (Mar. 27, 2018), <https://www.epi.org/publication/creating-jobs-and-economic-security/> [<https://perma.cc/WU53-M8KG>] (explaining the importance of “macroeconomic full employment” in the context of calls for job guarantees).

280. *Hon. E. Spencer Abraham*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/e-spencer-abraham> [<https://perma.cc/FYN3-JGHS>] (last visited Jan. 10, 2021).

281. *Immigrant Entrepreneurs, Job Creation, and the American Dream: Hearing Before the Subcomm. on Immigr. of the S. Comm. on the Judiciary*, 105th Cong. 4 (1997) (prepared statement of Sen. Abraham).

employees.<sup>282</sup> This works, in part, because the IRS encourages undocumented migrants to pay taxes by issuing individual taxpayer identification numbers (“ITINs”).<sup>283</sup> ITINs allow undocumented workers to pay taxes without a Social Security number.<sup>284</sup> Not only do ITINs facilitate the payment of individual income taxes, the IRS issues employer identification numbers (“EINs”) on the basis of ITINs.<sup>285</sup> This means undocumented owners can report the taxable income of their businesses and employees.<sup>286</sup> A key element in the success of ITINs is the fact that the IRS has committed to not share immigration-related information with other federal agencies.<sup>287</sup>

Undocumented migrants are further incentivized to pay taxes because future immigration benefits often hinge on tax compliance.<sup>288</sup> At present, it is estimated that 50% of undocumented migrants pay individual income tax using ITINs.<sup>289</sup> Creating lawful work opportunities could increase those state and local tax contributions by an estimated \$2.18 billion annually.<sup>290</sup> Even as these tax revenues increase, undocumented business owners will not be obtaining direct benefits from many of these taxes because they remain ineligible to receive tax-based benefits such as Social Security and unemployment.<sup>291</sup>

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282. See, e.g., Boorstin, *supra* note 277 (“[The interviewed business owners, one of whom was undocumented,] have paid state and federal taxes each quarter. They use a federal-tax ID number that the government assigned the business, which they have incorporated in their names. They have obtained all necessary licenses. They contribute payroll taxes for their employees—even the third of them who are illegal and use fake Social Security numbers bought on the street.”); see also GEE ET AL., *supra* note 262, at 3 (“Collectively, undocumented immigrants in the United States pay an estimated total of \$11.74 billion in state and local taxes a year.”).

283. See, e.g., Krishna, *supra* note 230, at 213.

284. *Id.* at 212.

285. Jacqueline Láinez Flannigan, *Reframing Taxation*, 87 TENN. L. REV. 629, 660 n.132 (2020) (“EINs can also be solicited by ITIN holders.”).

286. See, e.g., Roy Clemons & Dennis R. Lassila, *Choice of Entity Issues: Single-Member LLCs Vs. ‘Regular’ Sole Proprietorships*, 117 J. TAX’N 259, 262 (2012) (discussing LLCs use of EINs to file “required income tax and employment tax returns and making required employment tax payments and deposits where the LLC pays wages to employees”).

287. Krishna, *supra* note 230, at 213.

288. See, e.g., Nneka Obiokoye, *Taxation of Undocumented Migrants: The Uneasy Connection Between Regulating the Undocumented Immigrant and Fostering Illegal Activity*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 359, 368–71 (2018).

289. GEE ET AL., *supra* note 262, at 3. Others estimate that 75% of undocumented workers pay income tax. CONG. BUDGET OFF., THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 6–7 (2007), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf> [<https://perma.cc/8AK7-Y8CN>].

290. GEE ET AL., *supra* note 262, at 2 (estimating the effect of lawful work on taxation).

291. See, e.g., Obiokoye, *supra* note 288, at 378 (“[M]ost of these benefits are outside the reach of the undocumented immigrant because they are usually tied to legal immigration status, work authorization, or both.”).

Undocumented-owned businesses also contribute to the U.S. economy by revitalizing struggling neighborhoods.<sup>292</sup> In some cities, immigrant-owned business districts have become destinations for suburban shoppers.<sup>293</sup> Improving neighborhoods has the potential to significantly raise the economic and quality-of-life prospects of all members of the community—immigrant and native.<sup>294</sup>

The implications of creating lawful-work opportunities through the formation of business entities are vast. This approach has the potential to improve the economic well-being not just of individual workers but also the United States as a whole.

### CONCLUSION

With the passage of IRCA in 1986, the federal government created civil and criminal penalties for employers who hire undocumented workers. It created limited exceptions for employers hiring itinerant domestic labor and, in some cases, independent contractors. But such work often has had the same downsides as working for employers who disobey IRCA’s obligations: it tends to be irregular, unstable, low paid, physically demanding, and exploitative.

Business entities can expand opportunities for lawful work by those who do not have work authorization. Partnerships allow undocumented and documented owners to join together to run a “mixed-status business” without IRCA concerns, but this organizational form leaves partners subject to unlimited personal liability. Corporations were designed to protect business owners from personal liability, but the entity’s separation of ownership from control likely makes IRCA an obstacle for all work outside of the role of corporate director, and, even then, the separate taxation of corporations is not ideal. On the other hand, LLCs share the upsides of partnerships and corporations without attendant downsides. LLCs allow for lawful employment of owners lacking work authorization and provide the benefit of limited liability. LLCs are also scalable—the form embraces single-member LLCs that function like sole proprietorships as well as worker-cooperative LLCs that allow multiple low-wage earners to join together in a collaborative business relationship.

There is reason to believe that undocumented workers will be interested in business formation. Scholars have already established that U.S. immigrants, as a whole, are highly entrepreneurial—they are far more likely than U.S. citizens to start

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292. Rathod, *supra* note 147, at 183 (citing CTR. FOR AN URBAN FUTURE, A WORLD OF OPPORTUNITY 13–16 (Feb. 2007), [https://nycfuture.org/pdf/A\\_World\\_of\\_Opportunity.pdf](https://nycfuture.org/pdf/A_World_of_Opportunity.pdf) [<https://perma.cc/L2B8-M8J2>]); see also Steve J. Gold, *Undocumented Immigrants and Self-Employment in the Informal Economy*, in 3 HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES: UNDERSTANDING CONTROVERSIES AND TRAGEDIES OF UNDOCUMENTED IMMIGRATION 184 (2014) (noting that informal businesses “yield economic growth and neighborhood revitalization”); Kosten, *supra* note 8 (noting immigration “revitalize[s] neighborhoods”).

293. CTR. FOR AN URBAN FUTURE, *supra* note 292, at 10.

294. See, e.g., Robert Collinson & Jens Ludwig, *Neighborhoods and Opportunity in America*, BROOKINGS INST. (Sept. 19, 2019), <https://www.brookings.edu/research/neighborhoods-matter-for-opportunity-time-for-more-place-conscious-policy/> [<https://perma.cc/C3LS-85CY>] (discussing the improvements experienced when moving families from economically distressed to less-impooverished neighborhoods).

their own businesses.<sup>295</sup> Yet undocumented immigrants, to date, have been less inclined to work for themselves.<sup>296</sup> This Article explains the myriad benefits of entrepreneurship for the migrant who lacks work authorization. Such entrepreneurship, it turns out, extends its benefits far beyond the individual to enrich the entire U.S. economy.

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295. Azoulay et al., *supra* note 262, at 2; *see also supra* notes 8–9 and accompanying text.

296. *See supra* note 10 and accompanying text (indicating under 8% of undocumented immigrants start their own businesses).