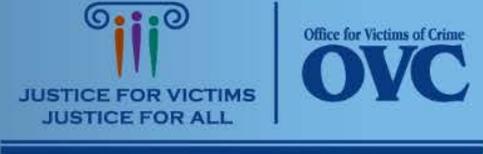




OVCTTAC



CONTINUUM OF LABOR EXPLOITATION: Wage Theft, Fraud in Foreign Labor Contracting and Human Trafficking

April 21, 2016
3:15–4:15 p.m. EST

Presenters:

Jennifer Tse, Regional Coordinator - Workplace Crimes, Wage & Hour Division, U.S. Department of Labor
Lynette M. Parker, Associate Clinical Professor of Law, Santa Clara University/South Bay Coalition to End Human Trafficking

The material presented during today's webinar session will be available on the Human Trafficking Learning Community.

The session will be recorded and will begin shortly.

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CONTINUUM OF LABOR EXPLOITATION

Wage Theft, Fraud in Foreign Labor Contracting and Human Trafficking

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- Have you been working with cases regarding labor exploitation/labor trafficking?
 - Yes
 - No

Poll

KGACLC/SCU – SBCEHT portion of this presentation:

- “This PowerPoint was produced by South Bay Coalition to End Human Trafficking (Katharine & George Alexander Community Law Center, Santa Clara University) under 2015-VT-BX-K031, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this PowerPoint are those of the contributors and do not necessarily represent the official position or policies of the U.S. Department of Justice.”
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ACKNOWLEDGEMENTS



Wage Slaves

Regulatory Non-Compliance

Regulatory Evasion

Wage Theft

Fraud in Foreign
Labor Contracting

Human Trafficking

LABOR EXPLOITATION CONTINUUM

Wage & Hour Investigation to Labor Exploitation or Labor Trafficking

Wage & Hour Cases

Fair Labor Standards Act, H-1B, H-2B, H-2A, Migrant Seasonal Protection Act, Child Labor, Family Medical Leave Act, Davis Bacon Act

Labor Exploitation

Less pay than promised, withheld pay, deductions
Below minimum wage
Denial of pay
No written earnings statement
Lack of safe water, toilet
Hazardous work environment
No meal breaks

Intermediate Experiences

Movement to work controlled
Physical or verbal abuse
Employee lives where he/she works
Visa fraud
Inequalities between employer and employee
Financial harm

Labor Trafficking

Climate of fear
Deprivation of basic needs
Disorienting, demoralizing environment
Use of violence, threats of violence
Diminished resistance
Intimidation and control
Fraud, deception
Use or threatened abuse of law
Debt owed – real or perceived

- Workers' Compensation Insurance Fraud
 - Have policy but missing payroll (or misreported work or suppressed claims)
 - 2-3-5 felony
 - No policy = misdemeanor
 - 1 year jail, \$10k min fine
- Payroll Tax Fraud 2117.5 and 2118.5 UIC
 - Willful failure to report
 - Willfully file false report
- **#1 Red Flag = Cash Pay**

LABOR EXPLOITATION

- PC 484/487: Theft of Labor/Wages
 - If labor: analyze like dine & ditch
 - If paying back from wages: what are consequences for employee who refuses; move up or down the continuum.
 - Felony = >\$950
- PC 532: Theft by False Pretenses
 - Beware of written agreements
- LC 1199: Failure to Pay Minimum Wage

WAGE THEFT

- The previously listed codes apply to the State of California. Do you know if your state has labor codes specific to wage theft and labor exploitation?
 - Yes, we do!
 - No, not that I know of.
 - I do not know.

Poll

- Labor trafficking involves wage theft or failure to pay wages that are legally owed
- Wage theft or a violation of a law enforced by the Wage and Hour Division alone does not constitute labor trafficking
- To constitute trafficking, the trafficker must exercise such physical or psychological control that the victim does not believe he or she is free to leave
 - e.g., physical harm, physical restraint, threats of harm, abuse of legal process, document retention, debt bondage

Wage Theft Alone is Not Human Trafficking

Wage theft is the failure to pay workers as required under the law. It could take the form of:

- Failure to pay minimum wage
- Failure to pay overtime for nonexempt employees
- Forcing workers to work off the clock (after punching out) and not paying for the “off the clock” work, and/or
- Failure to pay any wages at all

Employers will often misclassify employees as exempt or as independent contractor to avoid paying overtime or providing lunch periods, meal breaks and rest breaks.

Also, employers will take unlawful deductions from a worker’s paycheck.

What Is Wage Theft?

- Promissory Fraud (false promises) may occur in a labor trafficking case
- Labor Code 970 (the promissory fraud statute) may also occur in a labor trafficking case
- Promissory Fraud and Labor Code 970 alone do not constitute labor trafficking

**Promissory Fraud Alone Is Not
Human Trafficking**

- Sexual harassment (rape, touching, or words) may occur in a human trafficking case
- National origin harassment or religious harassment may occur in a human trafficking case
- Sexual harassment, national origin harassment, and/or religious harassment alone do not constitute a human trafficking case

Sexual, National Origin, and Religious Harassment and Human Trafficking

Severe forms of human trafficking are:

- a) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- b) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. [Emphasis added]

**8 CODE OF FEDERAL
REGULATIONS 214.11(a)**

- A “climate of fear” that compels labor or service
 - Physical or verbal abuse
 - Poor working and living conditions
 - Denial of adequate rest, breaks, medical care
 - Withholding of pay
 - Threats of harm or threats of deportation
 - Social isolation
- Victim’s “special vulnerabilities”
 - Physical, mental condition
 - Education, socioeconomic status
 - Inequalities between victim and trafficker
 - Unstable immigration status
- Recruitment schemes, fraud, coercion
- There does not need to be physical restraints
- The victim may have initially agreed to perform work

Considerations in Labor Trafficking

18 U.S. Code §1351

(a) Work Inside the United States.— Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations, or promises regarding that employment shall be fined under this title, or imprisoned for not more than 5 years, or both.

[emphasis added]

**FRAUD IN FOREIGN LABOR
CONTRACTING**

(b) Work Outside the United States.— Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment performed on a United States Government contract performed outside the United States, or on a United States military installation or mission outside the United States, or other property or premises outside the United States owned or controlled by the United States Government, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment, shall be fined under this title, or imprisoned for not more than 5 years, or both. [emphasis added]

FRAUD IN FOREIGN LABOR CONTRACTING

- Have you dealt with fraud in foreign labor contracting with victims from countries other than the Philippines? If so, where?

Poll

- What visas are you seeing used in cases of fraud in foreign labor contracting?
 - H-1B
 - H-2A
 - H-2B
 - B-1
 - E-2
 - Other

Poll

Human Trafficking

Recruiting: through fraud

- But also through coercion and force
- Fraud can go to employment or other false promises
- Harboring, transporting, providing, or obtaining

Fraud in Foreign Labor Contracting

Recruiting: through materially false or fraudulent pretenses, representations, or promises regarding that employment

- Fraud regarding employment
- No mention of coercion or force

HUMAN TRAFFICKING vs. FFLC

Human Trafficking

- Present in United States or territory
 - American Samoa or the Commonwealth of the Northern Mariana Islands
- On account of the trafficking
- Note: U.S. Embassies and military bases are U.S. land

Fraud in Foreign Labor Contracting

- Contracting for work inside or outside of the United States
- If outside
 - for purposes of employment through contract with U.S. gov't; military installation; mission; on property owned or controlled by U.S. gov't

HUMAN TRAFFICKING VS. FFLC

Human Trafficking

For purposes of:

- Involuntary servitude
- Debt bondage
- Peonage
- Slavery

Debts

Threats

- physical restraint, serious harm, abuse of legal process

Force

Fraud in Foreign Labor Contracting

- Recruit, solicit, or hire
- For purposes of employment
- By means of materially false or fraudulent pretenses, representations, or promises
- Does not need threats, force, or indebtedness

HUMAN TRAFFICKING VS. FFLC

U.S. Department of Labor Wage and Hour Division

Expands Support of Victims of Human Trafficking and Other Crimes

- Have you worked with the Department of Labor for any previous or current cases dealing with labor exploitation/labor trafficking?
 - Yes
 - No

Poll

Industries for Labor Trafficking, Labor-Related Criminal Activity, Exploitation

- Domestic work
- Residential home care
- Restaurants
- Agriculture
- Construction
- Exploitation of H-1B, H-2B, H-2A workers

- Detection
 - Of labor trafficking, labor-related crimes in the course of a WHD investigation
- Referrals
 - To criminal and civil law enforcement partners
- Back Wages
 - Calculations for securing restitution
- Human Trafficking Task Forces, ACTeams
- U Visa and T Visa Certifications

Wage and Hour Division's Role in Combating Labor Trafficking & Labor-Related Crimes

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting
- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes

U Visa Qualifying Criminal Activity

**U.S. Department of Labor
Wage and Hour Division's
U and T Visa Certification Process**

Wage and Hour Division Eligibility Requirements

T Visa

- Allegation of a severe form of trafficking in persons
- The alleged trafficking arises in the context of a work environment or an employment relationship
- There is a related, credible allegation of a violation of a law WHD enforces related to the work environment or employment relationship

U Visa

- Allegation of one of the 8 QCAs for which WHD will consider for certification
- The alleged QCA arises in the context of a work environment or an employment relationship
- There is a credible allegation of a violation of a law WHD enforces related to the work environment or employment relationship

Process Overview

How do U visa and T visa certification requests originate?

- Petitioner or advocate/attorney contacts WHD
- QCAs and/or trafficking are detected during the course of, or after, a WHD investigation

Initial Actions

Regional Coordinator – Workplace Crimes makes preliminary determination whether to recommend certification based on:

- Interview with petitioner
- Any supplemental information provided by petitioner or advocate on behalf of petitioner
- Any information, if available, during the course of a related WHD investigation

Final Determination

- Regional Coordinator – Workplace Crimes makes a final determination regarding recommendation
- If recommend certification, provide recommendation to the WHD Regional Administrator to certify

Case Examples

For Qualifying Criminal Activity and Trafficking in Persons

Questions?

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