

Expanding California's Law to Increase Protections for Temporary Guest Workers Benefits Businesses

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I. BACKGROUND

Fair labour advocates have documented the increasing use of foreign labour recruiters (FLRs) by business owners to bring temporary foreign workers to the United States,¹ and the associated fraud and abuse often permeating these practices.² Many FLRs are complicit in the trafficking of workers: '[R]egardless of visa category, employment sector, race, gender, or national origin, internationally recruited workers face disturbingly common patterns of abuse, including fraud, discrimination, severe economic coercion, retaliation, blacklisting, and human trafficking ... [T]hese abuses are systemic rather than visa specific.'³ Cases brought in federal courts chronicling FLR abuses are also increasing.⁴

The number of temporary workers in the USA grew from three to four million workers from 2012 to 2018.⁵ The H-2A program tripled in size from 80,000

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¹ See, e.g., Verité, Inc. and ManpowerGroup, 'An Ethical Framework for Crossborder Labor Recruitment' (15 February 2012), http://www.verite.org/sites/default/files/ethical_framework_paper_20120209_PRINTED.pdf (accessed 3 August 2020).

² Polaris Project, 'Human Trafficking on Temporary Work Visas' (1 June 2018), <https://polarisproject.org/wp-content/uploads/2019/01/Human-Trafficking-on-Temporary-Work-Visas.pdf> (accessed 3 August 2020).

³ The International Labor Recruitment Working Group, 'The American Dream up for Sale: A Blueprint for Ending International Labor Recruitment Abuse' (5 February 2013) 5, https://www.aft.org/sites/default/files/wysiwyg/international_labor_recruitment_abuse.pdf (accessed 3 August 2020).

⁴ See, e.g., *David et al v Signal International et al*, Civil Action No. 09-1220, 2011 WL 13205814 (ED LA 11 March 2011); *United States v Satish Kartan and Sharmistha Barai*, No. 2:16-cr-00217-MCE (ED Cal 19 March 2019), <https://www.morelaw.com/verdicts/case.asp?n=2:16-cr-00217-MCE&s=CA&d=127196> (accessed 3 August 2020).

⁵ Navarro, 'U.S. Nonimmigrant Admissions: 2018' (October 2019), <https://www.dhs.gov/immigration-statistics/nonimmigrant> (accessed 3 August 2020).

approved jobs in 2008 to over 257,000 in 2019.⁶ In 2013, 44 percent of employers hiring under the H-2A and H-2B programs alone planned to use third-party recruiters.⁷ Studies based on worker interviews show that 80–94.5 percent of workers are recruited through intermediaries.⁸

Federal action proposing a robust framework for regulating FLRs was passed in the Senate in 2013 as part of comprehensive immigration reform, but heavy lobbying from business interests, including the U.S. Chamber of Commerce, ensured that the Republican-led counterpart legislation in the House died in Committee.⁹

II. DOCUMENTED ABUSES BY FLRS IN CALIFORNIA

California is the leading US destination for temporary foreign workers, receiving 20 per cent of the total number annually. As of 2019, this constituted 150,000 individuals. Research into California's agriculture industry revealed that of 1,000 workers interviewed, over 300 were trafficked for labour and all had contact with a recruiter.¹⁰ Recruiting fees ranged from US\$2000 to US\$5000. Pay was reduced to about US\$1.50 per hour by fees imposed on the workers for transportation, food, rent and visa processing. Identification documents were confiscated on arrival, with freedom of movement severely restricted. Threats of deportation were constant.¹¹

III. CALIFORNIA TAKES ACTION

In 2013, California Senator Steinberg introduced SB 516 based on the federal model passed in the Senate. The law:

- (1) Establishes a registration program for FLRs
- (2) Requires FLRs to provide comprehensive information to foreign workers, in a language they understand, about the terms of proposed work in California;
- (3) Prohibits FLRs from charging a recruiting fee, soliciting workers' services in the absence of a *bona fide* contract from a potential employer, or unilaterally changing the terms of employment;

⁶ Centro de los Derechos del Migrante, Inc. (CDM), 'Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program' (2020) 11,15, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> (accessed 3 August 2020).

⁷ US GAO, 'GAO 15-154, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers' (2015) 26, <https://www.gao.gov/assets/690/684985.pdf> (accessed 3 August 2020) ('Actual percentages are likely higher than what employers voluntarily report.')

⁸ M Twohey, M Rosenberg and R McNeill, 'Brokers Recruiting Foreign Workers for U.S. Firms Compound Abuses' *Reuters* (19 February 2016).

⁹ Royce, HR 3344-Fraudulent Overseas Recruitment and Trafficking Elimination (FORTE), Act 2013-2014 (US).

¹⁰ S Kara, *Modern Slavery: A Global Perspective* (Columbia University Press, 2017) 108.

¹¹ *Ibid.*, 88.

- (4) Institutes reporting obligations for those employers using FLRs and mandates use of registered FLRs;¹²
- (5) Imposes civil and criminal penalties on FLRs and employers who violate the law;
- (6) Provides the California Department of Labor with substantive enforcement authority; and
- (7) Provides aggrieved workers with a civil cause of action to redress harms.

SB 516 passed both houses of the California Legislature with bipartisan support (Sen: 38–0; Ass: 54–24). The Governor returned the bill to ensure the fees covered the program’s costs.¹³ SB 477 addressed these concerns, again passing both houses of the Legislature with overwhelming bipartisan support (Sen: 34–0; Ass: 66–10). The Governor signed the bill in September 2014 with an effective date of 1 July 2016, making it the first law on either the federal or state level requiring FLR registration.

Significantly, from the business community’s perspective, the law imposes few obligations on employers. Those who directly recruit temporary workers are exempt. Those using an FLR only need to provide the California Labor Commissioner with the FLR’s name. Most importantly, employers avoid liability for an FLR’s conduct *if* they use a registered FLR.

IV. BARRIERS IN IMPLEMENTATION

The intent of SB 477, as reflected in its legislative history and accompanying fiscal analysis, makes clear that SB 477 was designed to cover *all* FLRs regardless of the visa categories, with two limited exceptions.¹⁴ Yet, the law has been interpreted as applying solely to FLRs recruiting H-2B workers. To remove any doubt about the law’s scope, AB 1913 (Kalra) was offered to provide the necessary technical correction.¹⁵ Through successful lobbying, the California Chamber of Commerce, aligned with the Growers’ Association, derailed the process by alleging that SB 477 was never intended to cover all temporary workers.

Without this legislative fix, the law covers only about 3,000–5,000 workers, rather than the intended 130,000–150,000.¹⁶ Moreover, four years after the bill’s effective date, not a single FLR has registered with the state. In May 2020, the California Division of Labor Standards notified 200 employers it believes may have violated the law, signalling that enforcement actions are beginning.

¹² As originally drafted, SB 516 imposed joint and several liability on both FLRs and employers. In a compromise with the business community, it was amended to create a safe harbour for employers using a registered FLR.

¹³ The overwhelming majority of non-immigrant temporary workers in California use the services of an FLR. Using a conservative estimate of 95,000 workers, based on those for whom visas were actually requested in 2012, a fee of just *US\$10 per worker* would cover the programme’s costs.

¹⁴ Despite documented abuses, due to business opposition, the J-I visa program was excluded from SB 516. Talent agency FLRs, whose licensing requirements impose more stringent obligations than SB 477, are also excluded.

¹⁵ Curing the problem requires deletion of California Business Code Section 9998 which reads: ‘This chapter shall apply only to “nonagricultural workers” as defined by Section 1101(a)(15)(H)(ii)(b) of Title 8 of the federal Immigration and Nationality Act.’

¹⁶ See generally 8 CA ADC § 13850 (2020).

V. WHY BUSINESSES SHOULD SUPPORT LEGISLATION REGULATING FLRS

Unscrupulous FLRs charge both employers and workers fees for their services. This ‘double dipping’ often takes the form of excessive costs for recruiting-related activities. Some FLRs engage in blatant fraud, recruiting workers for non-existent jobs, doctoring versions of legitimate documents, and fabricating websites and profiles of employers they purport to represent, sometimes using the names of real employers who are certified to offer temporary work visas.¹⁷ These disreputable recruiters vanish when an employer or worker seeks to hold them accountable for their misdeeds.¹⁸

A. Employer Liability for Labour Contractor Malfeasance

Employers may be held responsible for the damages arising from the illegal conduct of FLRs they hire. In *Ulloa v Fancy Farms, Inc.*,¹⁹ the Court held a Florida strawberry grower liable for illegal recruiting fees collected by its FLR. Federal regulations require that an employer contractually forbid a recruiter from seeking or receiving such fees. The Court held that the farm employer could reasonably have foreseen that its failure to contractually prohibit the contractor from assessing recruiting fees would result in the workers having to pay them.

This case represents one of the first times a grower has been held responsible for illegal placement and hiring fees paid to a recruiter. Given this precedent, employers should anticipate similar liability in the future, especially in California where the practice is rampant.²⁰

B. Liability for Financial Gain Derived from Knowledge, or Reckless Disregard, of Labour Trafficking by Others

The Trafficking Victims Protection Reauthorization Act (‘TVPRA’) imposes criminal and civil liability on *third-party beneficiaries* of the actions of traffickers if they knowingly benefit, ‘financially or by receiving anything of value,’ from participation in a venture which they knew or should have known violates the Act.²¹ A growing number of federal criminal cases,²² as well as civil actions,²³ have been brought against businesses under this section.

¹⁷ See Centro de los Derechos del Migrante, ‘Fake Jobs for Sale: Analyzing Fraud and Advancing Transparency in U.S. Labor Recruitment’ (2019) 23, <https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf> (accessed 3 August 2020).

¹⁸ B Rogers, ‘Toward Third-Party Liability for Wage Theft’ (2010) 31 *Berkeley Journal of Employment and Labor* 1, 20–21.

¹⁹ 762 Fed Appx 859 (2019).

²⁰ See Section II.

²¹ 18 U.S.C. §§ 1593A, 1595 (a) 2016.

²² See, e.g., *Doe v Tapia-Ortiz*, 2016 WL 3414862 (MD Fla 22 June 2016); *United States v Patel*, No. CR 13-286, 2016 WL 80566 (ED La 7 January 2016); *Ricchio v McLean*, 853 F3d 553 (1st Cir 2017) and *Ricchio v Bijal, Inc.*, 386 F Supp 3d 126 (D Mass 2019).

²³ See *Lesnik v Se*, No. 16-CV-01120-LHK, 2019 US Dist LEXIS 47373 at *2–3, 57 (ND Cal 20 March 2019); *Doe v Lorain-Elyria Motel, Inc.*, No. 2:19-CV-1194, 2019 WL 4929297, at *6 (SD Ohio 16 March 2020) (citing *Brown v Corrections Corporation of America*, 603 F Supp 2d 73, 81 (DDC 26 March 2009); *M.A. v Wyndham Hotels & Resorts, Inc.*, No. 2:19-CV-849 (SD Ohio 7 October 2019); *Bistline v Parker*, No. 17-4020, 2019 US App LEXIS 7503, at *53–58

Use of TVPRA provisions by aggrieved workers carries much greater risks to employers than claims under other employment statutes. The TVPRA, for example, has a ten-year statute of limitations versus the Fair Labor Standards Act's two-year statute for federal minimum wage and overtime claims, relaxed standards for establishing an employment relationship between the parties, and immigration protection to foreign workers allowing them to press their claims.²⁴ Cases brought under the TVPRA have resulted in very high compensatory and punitive damage awards.²⁵

C. Unscrupulous Labour Contractors Unfairly Compete with Businesses and Legitimate FLRs

Fraudulent activities enable FLRs to reduce foreign worker wages below nationally established levels, creating a competitive disadvantage for employers who pay the prescribed amounts.²⁶ Placing workers in a heightened state of vulnerability through abusive recruiting practices harms not only the workers, but also the broader labour pool by triggering a downward force on labour standards. Domestic workers are further harmed as they become more expensive to hire than their foreign counterparts, especially in the H-2A system.²⁷

Precisely because of the direct link between the illegal fees collected by unscrupulous contractors and labour trafficking, a number of private sector businesses have banded together with non-governmental organizations to eliminate recruiting fees in their supply chains. The Leadership Group for Responsible Recruitment's pioneering efforts²⁸ are supported in the global investment community by organizations including the Interfaith Center on Corporate Responsibility that also champion the elimination of recruiting fees and other forms of financial intimidation applied to workers, seeing them as a 'concealed gateway to conditions of forced labor.'²⁹

Efforts within specific industries to eliminate abusive practices in their supply chains are also becoming more widespread. In 2018, the American Apparel and Footwear Association launched 'a proactive industry effort to address potential forced labor risks for migrant workers in the global supply chain' in promulgating its 'Commitment to

(10th Cir 14 March 2019); *Gilbert v United States Olympic Commission*, No. 18-cv-00981-CMA-MEH, 2019 US Dist LEXIS 35921 (D Colo 6 March 2019).

²⁴ B Beltran, 'The Hidden "Benefits" of the Trafficking Victim Protection Act's Expanded Provisions for Temporary Foreign Workers' (2019) 41:2 *Berkeley Journal of Employment and Labor Law* 45–46, <https://ssrn.com/abstract=3448020> (accessed 3 August 2020).

²⁵ *Ibid*, 46 (citing AF Levy, 'Federal Human Trafficking Civil Litigation', *The Human Trafficking Legal Center* (2018) 24–26, <http://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf>).

²⁶ *Castellanos-Contreras v Decatur Hotels LLC*, 622 F.3d 393, 405 (5th Cir 2010) (*en banc*) (J Dennis, dissenting).

²⁷ See Council on Foreign Relations, 'U.S. Postwar Immigration Policy', <https://www.cfr.org/timeline/us-postwar-immigration-policy> (cited in Centro de los Derechos del Migrante, notes 7, 13).

²⁸ LGRP, 'Driving Positive Change: About the Leadership Group', Institute for Human Rights and Business (2016), <https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment> (accessed 3 August 2020). Members include: Coca Cola, GE, Hewlett-Packard, IKEA, Mars, M&S, Nestle, Nike, Tesco, Target, Pepsico, Unilever, Vinci, Walmart, IHRB, Interfaith Center on Corporate Responsibility, International Organization for Migration/The UN Migration Agency, ILO, Verité and Migrant Forum in Asia.

²⁹ ICCR, 'Best Practice Guidance on Ethical Recruitment of Migrant Workers' (2017) 6, <https://www.iccr.org/best-practice-guidance-ethical-recruitment-migrant-workers-0> (accessed 4 August 2020).

Responsible Recruitment', which includes a commitment that no worker should pay for his or her job. As of February 2020, 144 companies have signed the Commitment.³⁰

SB 477's provisions are strikingly similar to these voluntarily adopted practices. As such, they represent contemporary 'best practices' as identified by the global business community itself and should be readily embraced and endorsed by all reputable businesses.

VI. CONCLUSION

Companies that support the proposed legislative fix to SB 477 and reintroduction of a comprehensive federal provision governing FLRs' conduct will directly benefit from this needed oversight. Consumers are increasingly attuned to unconscionable supply chain practices, showing their displeasure through boycotts and willingness to pay more for products from responsible companies.³¹ Supporting regulatory provisions that go beyond voluntary commitments benefits businesses by reducing reputational risk, enhancing their standing as trustworthy companies, and increasing customer satisfaction. Information on *bona fide* FLRs further allows companies to improve operations by eliminating unnecessary middlemen and planning more effectively over the long term.³² Employers further benefit through their ability to secure employees willing to provide essential services and jobs in key areas that many American workers are unwilling to perform, even under a competitive compensation formula that is not artificially depressed by exploitative labour practices. The business community will be best served if it encourages individual enterprises, as well as related trade associations, to support advocacy efforts increasing SB 477's protections.

³⁰ See 'AAFA/FLA Industry Commitment to Responsible Recruitment Signatories as of February 19, 2020', https://www.aafaglobal.org/AAFA/Solutions_Pages/Commitment_to_Responsible_Recruitment (accessed 30 July 2020).

³¹ A Bateman and L Bonanni, 'What Supply Chain Transparency Really Means', *Harvard Business Review* (20 August 2019), <https://hbr.org/2019/08/what-supply-chain-transparency-really-means>.

³² *Ibid* ('Patagonia and Nike have very high rates of applications for their jobs ... Patagonia cites its employee turnover of less than 4% annually.').