



AB 364 Foreign Labor Contractors (Rodriquez & Rivas) Prevent Human Trafficking Before It Starts

BACKGROUND AND GOALS

AB 364 prevents human trafficking before it starts by regulating foreign labor contractors bringing all categories of temporary workers to California and clarifying that SB 477, Steinberg (2014) covers all temporary visa categories (except J-1), i.e., A-3, B-1, H-1B, H-1C, H-2A, H2-B, L-1, O-1, 1, P-3 3, and TN.

In 2014, California legislators passed SB 477 (Steinberg), a bill intended to protect internationally recruited workers from debt bondage, contract fraud, retaliation, indentured servitude, and human trafficking, with overwhelming bipartisan support (Sen: 34-0; Ass: 66-10). The Governor signed SB 477 into law in September 2014 with an effective date of July 1, 2016 after receiving a fiscal analysis proving the bill as applied across visa categories would pay for itself.

SB 477 was designed to prevent human trafficking and forced labor of *all* foreign workers resulting from the exploitative and abusive practices of foreign labor contractors (FLCs). It is the first law on either the federal or state level requiring registration of FLCs. Its main provisions require:

Disclosure. FLCs are required to provide full and fair information to foreign workers, in a language they understand, about the terms and conditions of work in California. A contractor may not knowingly provide a worker with false or misleading information. Employers using the services of an FLC to obtain workers are only required to provide the name of the FLC to the California Labor Commissioner.

Bona fide job offer. No contractor may solicit a foreign worker for a job in California in the absence of a bona fide offer of employment. A contractor may not charge a worker a fee related to recruiting activities. Contract terms and conditions may not be changed without adequate notice to workers.

Registration. FLCs are required to register with the California Department of Labor and satisfy bonding requirements. Employers using the services of registered contractors are exempt from liability for FLC misconduct.

Enforcement. FLCs, and employers using the services of unregistered FLCs, are subject to civil and criminal penalties for violations. Aggrieved workers have civil causes of action against both contractors and employers to protect their interests.

NEED FOR ACTION

SB 477 was intended to cover the approximately 200,000 temporary workers who now come to California annually. However, in its implementing regulations, the Division of Labor Standards Enforcement interpreted the law as applying only to H-2B workers – about 5000 workers annually- a tiny fraction of those workers SB 477 was intended to protect. Without the number of FLC registrants the law was anticipated to cover, the DLSE cannot fund the ongoing costs of the program thereby jeopardizing implementation of the law in its entirety. Moreover, with this extremely curtailed coverage, the protections in SB 477 are lost and it remains easy for unscrupulous FLCs to continue their exploitation and trafficking of California’s temporary workers. Recent criminal cases in California highlight the need for the worker and employer protections originally envisioned by SB 477 in combatting these abuses.¹

¹ See, e.g., 1) *Scalia, Secretary of Labor v. Munger Bros, LLC, Crown Cold Storage and Sarbanand Farms, LLC* (U.S. District Court for the Eastern District of California) Complaint filed November 18, 2019 alleging *inter alia* defendants’ violations in the recruiting and hiring of hundreds of farm workers to pick blueberries, many of whom were temporary workers hired under the H-2A visa program through the use of farm labor contractors who failed to provide the workers with employment contracts in a timely manner and to include required disclosures about wages and working conditions. Defendants are alleged to have further failed to: 1) pay all wages due; 2) provide the workers with safe housing as the housing was infested with bed bugs, inoperable toilets, windows with metal bars, and inoperable smoke alarms; 3) and provide safe transportation. <https://ecf.caed.uscourts.gov/doc1/033111364944>;
2) https://oag.ca.gov/system/files/attachments/press_releases/Filed%20criminal%20complaint.pdf. See also <https://www.justice.gov/opa/pr/former-stockton-convicted-human-trafficking-charges-related-forced-labor-foreign-nationals> (After an 11-day trial, a federal jury found Satish Kartan, 45, and his wife, Sharmistha Barai, 40, guilty on March 14 of conspiracy to obtain forced labor and two counts of obtaining forced labor. In addition, Kartan was found guilty of fraud in foreign labor contracting). 3) *People of the State of California v. Efren Alvarez*, No. F16902732, Superior Court of California, County of Fresno (trial held Aug. 13-31, 2018) On October 29, 2018, Efren Alvarez was sentenced to eight years in prison in one of California’s first farm labor trafficking cases. Alvarez hired three workers to trim fruit trees and then used a complex scheme in which he obtained the victims’ visas, passports and other documents and held them as collateral for a loan. He then threatened to harm the victims and report each of them to immigration officials if they did not continue to work for him. See <https://www.fresnobee.com/news/local/crime/article220799270.html> ; 4) 32 Mexican workers recruited to work in California’s avocado fields. They were promised work for 5-6 days a week, 8 hours a day, at \$10/hour. Upon arrival: work was sporadic and only a few hours at a time; unsafe and unsanitary working conditions -one bedroom for all workers, one shared bathroom with the entire camp, and no medical care; incurred additional debt for housing and food; when complained threatened with deportation and blacklisting; 5) 2016 - Matter of: Fernandez Farms Inc. and Gonzalo Fernandez, case number 1633146, Office of Administrative Law Judges. Hundreds of workers recruited to pick strawberries on H-2A visas. Charged as much as \$1750 per season for visa and recruiting fees; on the job, they were not paid the promised rate, or even the legally required wage; charged for housing that should have been free under the H-2A program; not given copies of their contracts; and the employer threatened them, made them hide when investigators were on site, and forced them to lie rather than report violations of their rights to investigators; 6) Cited in S. Kara, “Modern Slavery: A Global perspective, Chap 3, at 88 (Columbia University Press 2017) – Mexican worker promised \$10,000 for farmwork for the season; paid \$2000 to recruiter in Mexico for H-2A visa and \$667 for transportation to CA with both fees to be reimbursed at end of season; he was not paid for 2 months, was charged for transport to the US, food, rent, transport to and from the farm where he worked, attorney fees to process his visa, - even expenses to fix the truck that took him to the work site; his identity documents were confiscated on arrival, his freedom of movement and employment were restricted and he was only paid about \$1.50/hour through system of unfair and excessive wage deductions and under threat of deportation. He overstayed his visa at the FLCs request to earn additional funds. Been there 4 years- would like to leave for other work that pays more, but will be deported because of overstaying his visa.

The Covid-19 pandemic has further worsened the situation. Farms and processing plants across California's agricultural heartland region have reported alarming COVID-19 outbreaks, leading to a disproportionate rate of cases among the Latino and migrant community. Categorized as a high-risk group for COVID-19, Latinos make up 39% of the state population, but they represent 57% of coronavirus cases in California and 46% of deaths. About 90% of the state's agricultural laborers are Latino.² These individuals often work shoulder-to-shoulder for grueling hours in cramped conditions and then return home to close quarters, spreading infection throughout the community.³ As of mid-October 2020, the largest outbreak on a single farm in California was on a poultry farm (Foster Farms) in Merced County, where at least 392 employees tested positive, and at least 8 workers have died.⁴ This is just one of multiple outbreaks on farms and vineyards through California.⁵ There are systemic barriers to protecting California temporary workers, including farm workers⁶ Research has found that temporary workers employed by farm labor contractors may be even less protected.⁷

As the 5th largest economy in the world, California must lead the nation in its protections of workers from human trafficking and exploitation in its own backyard. To fully implement the

² "Essential and vulnerable: COVID-19 takes hard toll on California's migrant farm workers" (Sep. 3, 2020) <https://www.usatoday.com/story/opinion/2020/09/03/covid-19-hits-californias-migrant-farm-workers-hard-column/5689601002/>. See "As California Struggles With Covid-19, Farmworkers Are Among Most Affected" (Aug. 17, 2020) <https://www.wsj.com/articles/as-california-struggles-with-covid-19-farmworkers-are-among-most-affected-11597665116>;

³ "Newsome signs Covid-19 protections for agricultural workers" (Oct. 7, 2020) <https://calmatters.org/california-divide/2020/10/newsom-signs-covid-19-protections-for-agricultural-workers/> (Most Latino agricultural workers in Monterey County diagnosed with the virus live in the two poorest, most crowded ZIP codes in Salinas, which are primarily farmworking communities.) See "Covid-19's Harvest of Danger," <https://www.chcf.org/blog/covid-19s-harvest-danger/> (According to new research from the [California Institute for Rural Studies \(CIRS\)](#), agricultural workers in Monterey County are **three times more likely to contract COVID-19 (PDF)** than workers in other industries. Don Villarejo, PhD, founder of CIRS and author of the report, attributed the dramatically higher rate of infection among agricultural workers to working and living conditions that make it extremely difficult to practice physical distancing.)

⁴ <http://www.ncfh.org/msaws-and-covid-19.html> citing Lauten-Scrivner A. Foster Farms COVID-19 deaths among worst work-related outbreaks in California, official says. mercedsunstar. Accessed September 17, 2020. <https://www.mercedsunstar.com/news/coronavirus/article245767575.html>

⁵ <http://www.ncfh.org/msaws-and-covid-19.html>. See footnotes 27-42.

⁶ <http://www.ncfh.org/msaws-and-covid-19.html> citing Migrant farmworkers are getting fired for seeking Covid-19 medical treatment. The Counter. Published August 11, 2020. Accessed August 11, 2020. <https://thecounter.org/migrant-farm-workers-fired-reporting-covid-19-housing-louisiana/>

⁷ <http://www.ncfh.org/msaws-and-covid-19.html> citing COVID 19 Farmworker Study. Published 2020. Accessed October 1, 2020. <http://covid19farmworkerstudy.org/>

goals of SB 477 as envisioned by its original sponsors, AB 364 will effectuate SB 477's original intent of covering **all** visa categories⁸ and industry sectors, including H-2A recruited workers by:

Deleting Section 9998 of CA. Bus & Prof Code 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. It shall not apply to any person duly licensed as a "farm labor contractor" as that term is defined in Section 1682 of the Labor Code nor shall it apply to any person exempt from the licensing requirement in Section 1682.5 of the Labor Code or to any employer employing agricultural workers as defined by Section 1101(a)(15)(H)(ii)(a) of Title 8 of the federal Immigration and Nationality Act.

FACTS ABOUT FOREIGN LABOR CONTRACTORS

California is the leading destination state in the U.S. for temporary foreign workers, receiving over 215,000 in 2017.⁹ This number is steadily increasing, particularly in the agricultural sector. In California, the use of the H-2A program is up from a few thousand to almost 45,000 in fiscal year 2017. This trend is expected to continue as the H-2A program has tripled in size nationally from approximately 80,000 approved H-2A jobs in fiscal year 2008 to more than 240,000 in fiscal year 2018. Despite this substantial increase in numbers, in July 2019, DOL proposed regulatory changes making it easier for farmers to bring in temporary foreign workers under substandard wages and working conditions.¹⁰ Additionally, California's provisions have failed to protect workers from the unscrupulous activities that FLCs undertake overseas.

Indeed, FLCs are increasingly relied upon to recruit foreign workers for all sectors of the U.S. economy. As has been extensively documented, internationally recruited workers face common patterns of abuses related to their recruitment, including fraud, discrimination, economic coercion, retaliation, blacklisting, and, in some cases forced labor, debt bondage and human trafficking, regardless of visa category, employment sector, race, gender, or national origin.

H-2A RECRUITED WORKERS, IN PARTICULAR, NEED THE PROTECTIONS OF SB 477

1) SB 477's legislative history demonstrates the intent to include H-2A workers

⁸ J-1 visa recruiters and talent agents were explicitly carved out of the original bill through amendments because both groups are subject to licensing schemes more comprehensive than SB 477's registration system.

⁹ <https://www.dhs.gov/immigration-statistics/nonimmigrant> Cited figure includes only H-1B, H-2A, H-2B, O-1, O-2, P-1, Q-1, and R-1 visa holders.

¹⁰ See **Exponential Growth of the H-2A Visa Program in Recent Years, Coupled with Reduced Federal Oversight, Requires Enhanced Efforts for Protection of Workers Recruited under this Scheme by California, CAST (November 2019); EPI comments on proposed changes to regulations governing the H-2A visa for temporary agricultural workers** [Public Comments](#) by [Daniel Costa](#) (September 24, 2019). <https://www.epi.org/publication/public-comments-h-2a-visa-nprm/>

As the bill's author, former Sen. Darrell Steinberg and current Mayor of Sacramento, stated: "The legislative intent of SB 477 was to cover all temporary foreign workers coming to California through the foreign labor recruitment process on a wide range of visa categories including H-2A workers. The bill was never intended to be limited to coverage of just H-2B workers."

2) Neither federal nor other California law offers equivalent protections to H-2A workers

While federal law bans the assessment of recruiting fees, there is no effective mechanism for enforcing the prohibition throughout the chain of recruiters. California's *farm labor contractor licensing* scheme primarily focuses on working conditions after a worker is hired and on the contractor's obligations to the employer for whom he recruited the worker; it does not cover the activities of contractors recruiting migrant workers. SB 477's procedures do not conflict with any of the duties of farm labor contractors, but only augment their responsibilities to equal that of labor contractors recruiting under other visa categories. (See attached Chart).

3) H-2A workers in California are often abused by labor contractors

*Farm labor contractors are part of foreign recruiting networks. Most of the abuses of workers stem from the conduct of unlicensed contractors.

*There is no impetus to be licensed as the maximum fine is \$10,000 and the contractor can earn ten to twenty times that amount from exploited workers.

*Estimating 20 workers managed by one contractor, research shows a contractor can amass a pre-tax profit of 47.3 % from labor exploitation.¹¹

*Interviews with over 1000 agricultural workers in California's Central Valley (home to more than 99% of the U.S.' stock of 14 major crops and generating \$54 billion in revenues in 2016), uncovered:

**303 cases of human trafficking, 128 of which were H-2A visa holders.¹² In every case, regardless of the worker's status, a recruiter was involved.

***Paradoxically, the H-2A program offers further avenues for servitude than for undocumented workers

***73 of the 128 interviewed had overstayed visa terms and were in multiyear forced labor situations because employers failed to undertake the time/expense of filing annual paperwork

***Recruiting fees ranged from \$2000-5000.

**253 cases of debt bondage¹³

¹¹ S. Kara, "Modern Slavery: A Global perspective, Chap 3, Table B7 (Columbia University Press 2017)

¹² Id. at 108.

¹³ Id.

Coalition to Abolish Slavery & Trafficking (CAST)

Systemic change is at the core of CAST's mission. Taking a survivor-centered approach to ending modern slavery, CAST has a proven track record of working directly with survivors of human trafficking which builds an important bridge between practice and policy to inform effective policy initiatives. By developing broad-based partnerships, CAST effectively advocates for policies that work to end human trafficking and help survivors rebuild their lives.

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