



## Prevent Human Trafficking By Regulating Foreign Labor Contractors for All Temporary Visa Holders Coming to Work in CA

### BACKGROUND AND GOALS

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. It is the first law on either the federal or state level requiring registration of FLCs. Its main provisions require:

**Disclosure.** Foreign labor contractors 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 foreign labor contractors to obtain workers are required to report those activities.

**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.** Foreign labor contractors are required to register with the California Department of Labor and satisfy bonding requirements. Employers are required to use the services of registered contractors.

**Enforcement.** Foreign labor contractors, and employers using the services of unregistered foreign labor contractors, 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.

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### 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. With this extremely curtailed coverage, the protections in SB 477 are lost and it remains easy for FLCs to continue their exploitation and trafficking of California’s temporary workers.<sup>1</sup> In addition, 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.

As the 5<sup>th</sup> largest economy in the world, California must lead the nation in its protections of workers from human trafficking and exploitation in its own backyard. Experience since the legislation was enacted in 2014 revealing continuing exploitation and abuse of workers by those taking advantage of the existing regulations demonstrates the need for California to:

- 1) reinstate the joint and several liability provisions originally included in SB 516 (the predecessor to SB 477) and

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<sup>1</sup> 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) *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> ; 3) 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; 4) 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; 5) 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.

- 2) expand its criminal law protections to businesses, who knowingly profit from human trafficking, mirroring the provision enacted by the federal government in this area in 2008.<sup>2</sup>

Therefore in 2020, to fully implement the goals of SB 477 as envisioned by its original sponsors, the proposed amendments will:

- 1) Effectuate SB 477's original intent of covering **all** visa categories<sup>3</sup> 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.*

- 2) Reinstate<sup>4</sup> a provision included in SB 477 as originally drafted imposing joint and several liability on both foreign labor contractors and employers who use their services for breaches of the bill's requirements by:

Deleting the text of Section 9998.8(d) of the CA Bus. & Prof. Code and replacing it with:

*Foreign labor contractors and those persons using their services to obtain foreign workers or employees are jointly and severally liable for violations of this chapter.*

- 3) Define any person who knowingly *benefits* from a violation of California's laws addressing labor trafficking as a human trafficker and impose criminal liability, either by fine or imprisonment, on such person by:

Amending Section 236.1(a) of the CA Penal Code by adding the *italicized* language:

A person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, *or who knowingly benefits, financially or by receiving*

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<sup>2</sup> See 18 USC 1593A.

<sup>3</sup> 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.

<sup>4</sup> This provision was deleted after a compromise was reached during the legislative committee review process of SB 516 (Steinberg), SB 477's predecessor legislation that was introduced on February 21, 2013, providing a safe harbor solely for employers who use the services of a *registered* foreign labor contractor. Use of an unregistered FLC would subject the employer to the full range of SB 477's penalties.

*anything of value from such a deprivation or violation, knowing or in reckless disregard of that deprivation or violation, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000).*

## **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.<sup>5</sup> 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.<sup>6</sup> 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.

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## **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**

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 or 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*

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<sup>5</sup> <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.

<sup>6</sup> 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](https://www.epi.org/publication/public-comments-h-2a-visa-nprm/) by [Daniel Costa](#) (September 24, 2019). <https://www.epi.org/publication/public-comments-h-2a-visa-nprm/>

*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.<sup>7</sup>

\*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.<sup>8</sup> 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 bondage<sup>9</sup>

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## **JOINT AND SEVERAL EMPLOYER LIABILITY**

Employers sever legal responsibility for worker abuses by outsourcing recruitment, treatment and management of workers to labor subcontractors who provide them with the cheap labor pool they need.

Lack of accountability for compliance with existing laws is partially a function of insufficient enforcement, but even more a function of the absence of employer liability. The proposed amendment creates a direct legal relationship between the employer and the worker or vicarious liability of employers for their subcontractors' conduct. SB 477 originally created a safe harbor for employers who used a registered foreign labor contractor, as a compromise

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<sup>7</sup> S. Kara, "Modern Slavery: A Global perspective, Chap 3, Table B7 (Columbia University Press 2017)

<sup>8</sup> Id. at 108.

<sup>9</sup> Id.

with the business community in 2013, but increasing reports of FLC abuse and employers benefitting from this abuse since passage of SB 477 require inclusion of this provision.<sup>10</sup>

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## **CRIMINAL LIABILITY ATTACHES FOR THOSE WHO KNOWINGLY PROFIT FROM VIOLATIONS OF CALIFORNIA'S LABOR TRAFFICKING LAWS**

California must take additional steps to prevent modern slavery in its own backyard. To effectively curtail exploitation of workers, any person who knowingly profits, either financially or otherwise, through violations of California's labor trafficking laws, including the foreign labor contracting registration law, should be guilty of human trafficking and subject to criminal liability for this serious abuse of human rights.

Potential imposition of a fine or a term of imprisonment incentivizes contractors, primary employers using their services, and any other persons in a position to knowingly profit from worker exploitation, to monitor their practices to assure compliance with all California's laws prohibiting labor trafficking, including the foreign labor contractor registration legislation.

This provision in CA law will mirror federal law enacted in 2008. Successful litigation under this law demonstrates the need for this provision in the world's 5<sup>th</sup> largest economy.<sup>11</sup> In Ricchio v.

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<sup>10</sup> See, e.g. at Chap. 3 (FLCs serve as intermediaries providing farm owners with the cheap labor pool they desire while severing the farm owner's legal liability for treatment of the workers both during the recruiting process and employment. Of 1000 workers interviewed, found 303 cases of human trafficking and 253 cases of debt bondage.); The Typology of Modern Slavery: Defining Sex and Labor Trafficking in the United States, Polaris Project (March 2017)<https://polarisproject.org/sites/default/files/Polaris-Typology-of-Modern-Slavery.pdf> (Abuse and exploitation of agricultural workers happens at multiple levels due to the complex labor supply chain of recruiters, managers, contractors, subcontractors, growers, and buyers. Recruiters charge victims recruitment and travel fees that create insurmountable debt. Traffickers subject victims to squalid living conditions, isolate them in rural parts of the country with little ability to access support, and substitute pay on a piece-rate basis for a recruiting promise of an hourly wage.); Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas, Polaris Project (October 2015) [http://polarisproject.org/sites/default/files/Temp%20Visa\\_v5%20%281%29.pdf](http://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf) (The "Agriculture/Farms/Animal Husbandry" industry is one of three from which the most reports of labor trafficking and labor exploitation were recorded in this study. Of the total 823 victims identified as subject to labor trafficking or labor exploitation, 282 of them were recruited under the H-2A visa program.)

<sup>11</sup> See, e.g., Lagayan v. Odeh, 199 F. Supp. 3d 21 (D.D.C. 2016) (2016 WL 80566) Allegations of live-in domestic worker, a citizen of the Philippines, against husband and wife who allegedly illegally trafficked her into United States, that husband took and kept her passport from her before they boarded plane from Dubai to United States, and that husband and wife required her to work 15 or more hours every day without any days off, did not permit her to go outside the home without supervision, allowed her only once-monthly contact with her family, warned her not to talk to others, particularly other Filipinos, and forced her to work for them without pay, were sufficient to state claims under Trafficking Victims Protection Act (TVPA) provisions 18 USC §1593A ; Doe v. Tapia-Ortiz, No. 214CV206FTM38MRM, 2016 WL 3414862 (M.D. Fla. June 22, 2016) Tapia recruited migrant agricultural workers from day labor lines and stores with false promises including wages higher than they were earning and more work hours than they had been working. Plaintiffs were recruited by Tapia to work in the fields and packing house for local area farmers. Complaint clearly states that defendant used threats of harm, physical violence, firearms, threatened abuse of law, and deportation to coerce workers to work hours they were not paid for and to stay on his crew all of which state a claim pursuant to the TVPRA. "Plaintiffs also claim compensatory damages and punitive damages under 18 USC§1593A. Plaintiffs bear the burden of proving damages in a default judgment . . . Accordingly, the Court will hold a hearing on the damages pursuant to the TVPRA."

Lagasan v. Al-Ghasel, 92 F. Supp. 3d 445 (E.D. Va. 2015) A 27-year-old Filipino woman who was trafficked through Qatar into the United States and forced to work excessive hours in abominable working and living conditions for meager wages stated a claim against her employers for benefiting financially from trafficking in

McLean, 853 F.3d 553, 557 (1st Cir. 2017), for example, where the alleged victim adequately alleged that motel owner's and operators' association with hotel guest who was holding her against her will was a venture in which the owner and operators knowingly benefited through renting space in which a guest obtained forced sexual labor or services from the alleged victim, it was sufficient to state a claim for forced labor under 18 USC §1593A.

#### **PRIOR SUPPORT FOR UPDATING SB 477**

Alliance to End Slavery & Trafficking (ATEST)

Asian Americans Advancing Justice

Asian Pacific Islander Legal Outreach

CA Labor Federation

CA Rural Legal Assistance Foundation

Centro de los Derechos del Migrante

Centro Legal de la Raza

Coalition To Abolish Slavery & Trafficking (CAST)

Economic Policy Institute Policy Center

Equal Rights Advocates

Farmworker Justice

Filipino Bar Association of Northern CA

Filipino Community Center

International Labor Recruitment Working Group

Justice at Work

Justice in Motion

Koreatown Immigrant Workers Alliance

Loma Linda University Church

National Alliance for Filipino Concerns

Pilipino Association of Workers and Immigrants - Silicon Valley

Plumbers, Steamfitters, Pipefitters & HVAC Service Technicians Local 393 AND Santa Clara Valley Contractors Assn

Santa Clara County Wage Theft Coalition

SEIU CA

SF Day Labor Program & Women's Collective

UC Davis Dept. of Asian American Studies

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persons in violation of the Trafficking Victims Protection Act (TVPA), where she alleged that employers knowingly benefited from their participation in trafficking venture that violated the TVPA by receiving her labor for meager wages, as evidenced by fact that they entered into employment contract which promised her “prevailing wages of Pennsylvania” for her services but then refused to honor terms of that contract. 18 U.S.C.A. § 1593A. See also United States v. Patel, No. CR 13-286, 2016 WL 80566 (E.D. La. Jan. 7, 2016).

## United Farm Workers

### 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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