

# CLIENT BULLETIN

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Client Bulletin #577



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## Help Wanted: Avoiding Inadvertent Participation in Labor Trafficking

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Is your company a labor trafficker? Surely not. But if your company employs large numbers of foreign seasonal workers, you could be implicated in trafficking even if you don't mean to be.

Employment of foreign seasonal workers peaks during the summer, when many employers in a wide variety of industries increase their temporary and part-time workforces. Whether foreign workers are employed directly or through a temporary staffing agency, both the **U.S.** Department of Labor and the Equal Employment Opportunity Commission caution employers about the dangers of taking shortcuts.

Labor trafficking is not just a criminal and immigration issue. It is also a labor and employment problem that may affect employers who would otherwise have no intention of participating – just ask Signal International. Last year, Signal paid \$20 million to settle claims of trafficking related to workers from India who were brought to the United States – with the “help” of a labor recruiter and immigration lawyer – to work as pipefitters, construction workers, and the like, after Hurricanes Katrina and Rita. According to the Southern Poverty Law Center, the workers paid their recruiter \$10,000 to \$20,000 on the promise that they would get green cards, which would allow them to work indefinitely in the United States. The workers never got the green cards, and they were forced to pay to live in labor camps in Louisiana and Texas that had substandard living conditions.

Sixty-eight percent of the estimated 21 million victims of human trafficking worldwide are estimated to be victims of forced labor – often in the construction, apparel, agricultural, hospitality, restaurant, and theme park industries. In the United States, inadvertent labor trafficking is a problem especially in California, Florida, New York, and Texas.

According to **federal law**, labor trafficking involves “the exploitation of someone for the purpose of compelled labor through the use of force, fraud, or coercion.” There is a common misconception that trafficking requires smuggling or requires that the foreign worker be here illegally. However, an estimated 71 percent of U.S. labor trafficking victims enter the country on lawful visas, often through the federal **H-2A** and **H-2B**



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**visa programs.** Accordingly, even if an employer uses a third party to recruit and supply foreign seasonal workers (like a temporary staffing agency), as the entity receiving the benefit of the work, the employer is not shielded from potential liability. For instance, if the employer has reason to know that a worker's employment or pay is not what was promised, then it may be participating in the "fraud" originated by the recruiter. Additionally, a U.S. employer may be exposed to liability for "labor extortion" by failing to ensure compliance with the H-2A (agricultural) or H-2B (non-agricultural) programs, violating the Fair Labor Standards Act, or **engaging in discriminatory conduct prohibited by Title VII.**

## How to Avoid Being an "Accidental" Trafficker

### 1. Do your due diligence on the recruiter or staffing agency that supplies your workers.

Under the Immigration Reform and Control Act, an employer can be legally responsible for knowingly "using" an illegal worker, even if the employer delegates recruiting to an agency. A formal employer/employee relationship is not required for liability to attach. Therefore, make sure that you use a reputable and ethical recruiter or other labor provider. In that regard, a **helpful guide to ethical labor practices** has been published by the human rights organization Verité and Manpower, Inc.

### 2. Trust, but (E)verify your workers.

Even if your recruiter is trustworthy and ethical, don't take any shortcuts. Require that anyone who works for you complete an I-9. Even if you are not legally required to use the government's E-Verify system, use of that system is strongly recommended. Be aware that many traffickers will confiscate legal documents from the worker, so confirm that the worker has access to his or her own passport and legal identification.

### 3. Treat foreign workers the same way you treat your non-foreign workers.

There should be no difference in the wages and benefits offered to foreign workers and U.S. workers, with the exception of benefits such as Social Security and tax withholding, which do not apply to foreign workers. Provide foreign workers with an orientation that covers basic company policies, including those involving workplace safety, non-discrimination, and labor laws, in the language that they understand. Provide them with an employee manual in their language and encourage them to report any unfair treatment they may be experiencing while working for your company. If you have nonimmigrant seasonal workers subject to the federal H-2A (agriculture) or H-2B (non-agriculture) programs, you will have detailed requirements to follow, including posting requirements. Be sure that you comply with all applicable legal requirements. Again, even if your seasonal workers came to you through a recruiter or staffing agency, you all share control of the workers and therefore may be jointly responsible for the workers' safety and well-being.

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#### **4. The EEOC has recently become more active in policing labor trafficking situations.**

The agency's current position is that trafficking often involves national origin and race discrimination, as well as sexual harassment based on the sexual exploitation of foreign women workers, and it will pursue employers under those theories. (The EEOC was involved in the Signal International case discussed above.) In another EEOC case, which settled in 2014, Mac Farms of Hawaii, LLC, Kauai Coffee Company, INC., Kelena Farms, Inc., and Captain Cook Coffee Company, Ltd. paid \$2.4 million. The EEOC has also won a labor extortion case against Global Horizons and settled with Del Monte Fresh Produce for more than \$1 million. In the Global Horizons case, the EEOC has petitioned the court for an award of \$20.1 million dollars against Global Horizons - \$300,000 for each victim of labor trafficking. Each of these cases involved labor extortion evidenced by disparate treatment of foreign workers regarding appropriate training and safety equipment, accommodations, pay, and work hours.

#### **5. Actually pay your foreign workers the appropriate wage without unauthorized deductions.**

The overtime and minimum wage provisions of the Fair Labor Standards Act apply to foreign workers while they're working in the United States just as they apply to U.S. workers. Thus, they should be paid at least every two weeks what they were promised when they were recruited. Visa, visa processing, inbound U.S. transportation, or other fees incurred by H-2A and H-2B workers must be reimbursed in the first workweek. If not, the unreimbursed fees will normally reduce the worker's net pay for that week below the minimum wage, violating the FLSA, H-2 requirements, and most, if not all, state wage payment laws. Although the amounts may not be significant on an individual level, they can be substantial if aggregated in a class or collective action, and legal services organizations do not hesitate to bring such actions.

Traffickers commonly require foreign workers to pay "recruitment" fees, often using high-interest (that is, impossible to pay) loans. The April 29, 2015, the DOL and the U.S. Department of Homeland Security issued an Interim Final Rule, which applied to all H-2B applications filed with the DOL on or after that date. The Interim Rule requires an H-2B employer to provide copies of any agreements with recruiters and the names and locations of any subcontracts used by the recruiters. Under applicable rules, both H-2A and H-2B employers must contractually prohibit recruiters from seeking or receiving fees from prospective workers and must make the document available upon request by the DOL.

#### **Conclusion**

The laws governing guest workers, labor trafficking, and labor recruiting can be extremely complex, and this article provides only a summary. If you need assistance,

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please contact any member of our **Immigration, Global Mobility, or Wage and Hour** practice groups

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