

# Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program

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*Migrant workers often incur high debt to pay recruitment fees for placement as guest workers in the United States.<sup>1</sup> Recruiters regularly use false promises regarding working conditions and earnings opportunities to extract exorbitant fees. Workers then find low pay and dangerous conditions. Yet many workers rightly fear complaints will lead to deportation, leaving them unable to repay their debts. Theoretically, workers are protected by H-2 program regulations that prohibit shifting recruiting costs to workers. Yet these prohibitions mean little if they do not permit plaintiffs to recover the underlying fees in private actions against employers and recruiters. The H-2 regulations do not include a private right of action, and the Fair Labor Standards Act applies only in limited circumstances. Accordingly, this Note analyzes the merits of private actions for relief under three alternative sources: The Racketeer Influence Corrupt Organization Act; state tort law; and the Trafficking Victims Protection Act. Finding each approach largely ineffective in protecting the rights of guest workers, this Note suggests legal changes that would hold employers strictly liable for fees their recruiters charge. Strict liability for employers ultimately serves the policy goals of the regulatory scheme and places enforcement responsibility with those best able to police compliance.*

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1. This Note uses the terms “migrant worker” and “guest worker” to refer to participants in the H-2A and H-2B temporary worker programs described in detail *infra* Part II.A. This note does not deal with highly skilled foreign workers granted temporary visas under the H-1 program.

## I. INTRODUCTION

The federal guest worker program has a sordid reputation of participating employers abusing workers. The program consists of the H-2A agricultural and H-2B nonagricultural visa programs, which issue temporary visas to unskilled seasonal workers in industries such as agriculture, landscaping, hospitality, and construction.<sup>2</sup> Together, the programs employ over 120,000 migrant workers annually.<sup>3</sup> These workers are routinely cheated out of wages, held in virtual captivity by employers and labor brokers, placed in the most dangerous jobs, without adequate safety training and equipment, forced to live in squalid conditions, and denied medical benefits for on-the-job injuries.<sup>4</sup> Yet workers often pay thousands of dollars to in-country recruiters who falsely promise high wages, quality work, and legal immigration status. Between travel, visa, and recruitment fees, guest workers typically arrive in the United States with program-related debt from \$500 to over \$10,000.<sup>5</sup> This debt adds pressure to remain in unsatisfactory employment and thus enables many other abuses.

The H-2 regulations promulgated by the Department of Labor (DOL) and the Department of Homeland Security (DHS) prohibit this practice: Employers may not shift recruitment costs to workers and must prohibit their recruiters from doing so.<sup>6</sup> However, those workers brave enough to come forward have been unable to recover recruitment fees paid to recruiters in their home

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2. Glen M. Krebs, *H-2B or Not To Be*, FED. LAW., July 2009, at 62, 63. For a more robust description of the H-2A and H-2B programs, see *infra* Part II.A.

3. See S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 9 (2007), <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>.

4. *Id.* at 2; Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program's Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 187–88, 207 (2004) (describing housing conditions and asserting farm workers suffer from highest rates of toxic chemical injuries of any workers in U.S. and higher rates of heat stress, pneumonia, tuberculosis, and other conditions). House Ways and Means Committee Chairman Charles Rangel described the program as “the closest thing I’ve ever seen to slavery.” S. POVERTY LAW CTR., *supra* note 3, at 2 (citing interview on Jan. 23, 2007).

5. S. POVERTY LAW CTR., *supra* note 3, at 9.

6. 20 C.F.R. § 655.105(p) (H-2A), § 655.22(g) (H-2B); see Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,037 (Dec. 19, 2008); see discussion *infra* Part II.C.

countries.<sup>7</sup> The DOL and DHS inadequately oversee the recruitment process,<sup>8</sup> and, once visas are granted, neither agency has satisfactorily enforced the program requirements.<sup>9</sup> Furthermore, workers are unable to initiate redress because the agency regulations lack a private right of action.<sup>10</sup> Although the Fair Labor Standards Act (FLSA)<sup>11</sup> may apply in extremely limited circumstances, it disallows recovery where employers are, or claim to be, unaware that recruiters are charging workers directly.

Accordingly, migrant community advocates have experimented with many statutory and common-law tactics. Three have been particularly promising: the Racketeer Influenced and Corrupt Organization Act (RICO), domestic tort claims, and the Trafficking Victims Protection Act (TVPA). Each addresses slightly different scenarios, and, practically, many complaints combine them.<sup>12</sup> Assuming migrant worker recruiters are considered agents of U.S. employers, RICO and common-law tort claims based on mail and wire fraud could potentially be used to

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7. See *infra* notes 66–81 and accompanying text.

8. Nevertheless, the agencies recently relaxed the minimal oversight provided during the employer application and certification processes. The Low Wage Worker Legal Network described the changes as an “evisceration of the minimal administrative safeguards that exist in the H-2B program” that will “open[] up the program to wholesale abuse by employers, subjecting H-2B workers to further exploitation, depriving U.S. workers of gainful employment, and degrading wages and working conditions with in the domestic labor market.” Letter from Low Wage Worker Legal Network et al. to Elaine L. Chao, U.S. Sec’y of Labor 18 (July 7, 2008), [http://www.friendsfw.org/h-2B/DOL\\_H-2b\\_2008-07-07.pdf](http://www.friendsfw.org/h-2B/DOL_H-2b_2008-07-07.pdf) (commenting on the DOL’s proposed regulations for H-2B). For details of the new H-2A program, see Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110 (Dec. 18, 2008) (to be codified at 20 C.F.R. pt. 655). For details of the new H-2B program, see Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (to be codified at 20 CFR pts. 655–56).

9. These regulations are rarely, if ever, enforced. See *infra* notes 61–64 and accompanying text.

10. See *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638 (9th Cir. 1984) (interpreting *Cort v. Ash* to hold H-2A workers do not have private right of action to enforce rights provided under program). All H-2A workers and most H-2B workers are also excluded from the additional protections of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801–72 (2006), which includes a private right of action and provides for actual or statutory damages. § 1854; see *Guerra*, *supra* note 4, at 199–200.

11. §§ 201–219.

12. See, e.g., *Catalan v. Vermillion Ranch Ltd. P’ship*, No. 06-cv-01043-WYD-MJW, 2007 WL 951781 (D. Colo. Mar. 28, 2007) (alleging FLSA, TVPA, and RICO violations, as well as common law tort and contract claims).

hold employers liable for agents' misleading acts in workers' home countries. However, both have potentially fatal extraterritoriality limitations. The TVPA, on the other hand, may reach both foreign and domestic defendants, but perhaps only in the most extreme circumstances. While all three have been utilized with some success in lawsuits, victories are contentious and infrequent,<sup>13</sup> and many workers find themselves without redress.

This Note advocates for an approach that will help avoid the abusive recruitment fees imposed on guest workers and provide them with remedies for such abuse.<sup>14</sup> It rests on the normative assumption that workers should not be responsible for recruitment fees. Part II describes the recruitment process and its abuses. It also examines current guest worker regulations and existing labor law protections. Part III then discusses plaintiffs' attempts to recover under RICO, state tort law, and the TVPA. Finding these protections inadequate, Part IV argues for policy changes to safeguard workers more effectively and suggests how those changes might be implemented. Concluding that U.S. employers are in the best position to stem these abuses and safeguard worker rights, Part IV argues that employers should be held strictly liable for fees that recruiters who operate on their behalf charge whenever it results in pay below the federal minimum wage.

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13. See, for example, *Does v. Rodriguez*, No. 06-cv-00805-LTB, 2007 WL 684114 (D. Colo. Mar. 2, 2007) discussed *infra* notes 106, 119, and *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004), discussed *infra* notes 202–206.

14. This Note focuses on the difficulty plaintiffs face recovering fees using the private rights of action available under current law. See discussion *infra* Parts I, II. However, plaintiffs face additional barriers to relief. For example, many potential plaintiffs are located abroad, and most plaintiffs in the United States are ineligible for government funded legal services, which explicitly forecloses them from serving as H-2B workers. Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003) (discussing denial of state-funded legal services to legal foreign workers); Arthur N. Read, *Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 440 (2007). While H-2A workers are eligible for representation, employers regularly deny communication between Legal Aid lawyers and workers. Guerra, *supra* note 4, at 197–98. More broadly, grower associations' lobbying efforts have successfully prohibited Legal Aid from representing class actions and from communicating with workers once they have returned to their home countries. *Id.* While these barriers to relief merit further analysis, they are beyond the limited scope of this Note.

## II. THE ROUND HOLE: RECRUITMENT ABUSES IN THE GUEST WORKER PROGRAM

Recruitment abuses stem from the structure of the guest worker program and the lack of adequate public and private enforcement mechanisms. This Part provides an overview of the program and the laws that constrain it. Part II.A describes the primary features and goals of the H-2A and H-2B programs. Part II.B discusses how these programs work practically, providing a glimpse of the recruitment process and resulting abuses. Part II.C analyzes the current state of the law, finding official program enforcement ineffectual and private remedies inadequate.

### A. AN OVERVIEW OF THE U.S. GUEST WORKER PROGRAM

The guest worker program permits employers to recruit and employ nonimmigrant,<sup>15</sup> foreign workers to fill seasonal positions where there is a shortage of domestic workers.<sup>16</sup> It consists of two separate but related programs: The H-2A agricultural labor program and the H-2B nonagricultural program. Under both programs, an employer's needs must be temporary in nature — lasting for one year or less under the H-2A program and ten months or less under the H-2B program — and resulting from a seasonal or one-time need for additional labor.<sup>17</sup> Employers must attest

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15. The Department of Homeland Security defines nonimmigrant as “[a]n alien who seeks temporary entry to the United States for a specific purpose.” U.S. Dep’t of Homeland Sec., Definition of Terms, <http://www.dhs.gov/files/statistics/stdfdef.shtm#13> (last visited Apr. 20, 2010) (listing examples such as foreign government officials, visitors for business and for pleasure, students, and temporary workers).

16. For an overview of both programs, see U.S. Dep’t of Labor, H-2A Certification (last visited Apr. 20, 2010) [hereinafter DOL, H-2A Certification], <http://www.foreignlaborcert.doleta.gov/H-2a.cfm>, and U.S. Dep’t of Labor, H-2B Certification for Temporary Nonagricultural Work (last visited Apr. 20, 2010) [hereinafter DOL, H-2B Certification], <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

17. See DOL, H-2A Certification, *supra* note 16 (defining temporary as “employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show that the need for the foreign workers(s) is truly temporary”); DOL H-2B Certification, *supra* note 16 (declaring employment temporary where “the employer’s need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary,” but noting that an employer’s recurring “seasonal or peakload need lasting longer than 10 months” will be rejected). The H-2B program permits employment up to three years for some one-time occurrences. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing

that there are insufficient domestic workers to perform the temporary work and that employing foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.<sup>18</sup>

Unlike domestic workers, H-2A and H-2B guest workers cannot simply switch employers. Their visa status is tied to the specific employer, and they face deportation upon job termination, whether voluntary or involuntary.<sup>19</sup> This program restriction makes indebted workers particularly vulnerable to employer abuse. They may fear that complaining about wages or working conditions will lead to dismissal and force them back to their home country where repaying their debt from entering the guest worker program may be virtually impossible.<sup>20</sup>

The H-2A and H-2B programs differ in three respects. First, the job opportunities under each program are mutually exclusive: The H-2A program applies only to unskilled agricultural employment, while the H-2B program applies to nonagricultural “occupational areas such as construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.”<sup>21</sup> Second, while the H-2A program permits unlimited applicants,<sup>22</sup> the H-2B program has a 66,000

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in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,026 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655–56).

18. DOL, H-2A Certification, *supra* note 16 (outlining procedures for demonstrating insufficient domestic workers for position); DOL H-2B Certification, *supra* note 16 (same).

19. See Guerra, *supra* note 4, at 205 (“Unlike undocumented migrant workers, and like slaves, H-2A workers are ‘essentially indentured to a single employer. . . . If the work is insufficient, the employer is abusive, or the housing is intolerable . . . his only option is to tolerate it or quit and return immediately to his native country.” (internal quotation marks omitted)). While the DOL asserts H-2A workers are “free to move between H-2A certified jobs,” they may obtain new employment only once their current contract expires. Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,155 (Dec. 18, 2008) (responding to comments regarding H-2A regulations). Prior abandonment is a program violation and may prevent workers from participating in the future. *Id.*

20. Guerra, *supra* note 4, at 208.

21. Read, *supra* note 14, at 432–33 (quoting statement by U.S. Citizenship and Immigration Services).

22. Press Release, U.S. Dep’t of Homeland Sec., Fact Sheet: H-2A Temporary Agricultural Worker Program (Feb. 6, 2008), [http://www.dhs.gov/xnews/releases/pr\\_1202308216365.shtm](http://www.dhs.gov/xnews/releases/pr_1202308216365.shtm). In 2009 there were 60,112 H-2A visas issued, compared with 64,404 in 2008. U.S. Dep’t of State, Report of the Visa Office 2009, Table XVI(B) (2009), available at [http://www.travel.state.gov/visa/frvi/statistics/statistics\\_4594.html](http://www.travel.state.gov/visa/frvi/statistics/statistics_4594.html).



worker cap, which is regularly reached and sometimes exceeded.<sup>23</sup> Finally, the worker protections under the two programs differ greatly. The H-2A program provides significantly more safeguards, including requirements that the employer provide free housing and guarantee to offer each worker employment for at least three-quarters of the workdays during the contract period.<sup>24</sup> While labor advocates complain such requirements are rarely enforced, they offer at least theoretical protections, which are completely lacking in the H-2B context.<sup>25</sup> Both programs have resulted in serious abuse by employers and their recruiters.<sup>26</sup>

#### B. THE PROGRAM IN OPERATION: STORIES OF EXPLOITATION AND ABUSE

The recruitment of guest workers begins overseas in workers' home countries, with the vast majority of employers relying on private, international recruiters.<sup>27</sup> The process involves a series of fees that employers, labor contractors, and recruiters routinely pass on to workers. There are often multiple levels of recruiters involved, including international labor brokers that employers select, national recruitment agencies, and community-level agents who compile recruitment lists.<sup>28</sup> Program-related debt can well exceed \$10,000, much of which arises from home-country

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23. See U.S. Citizenship & Immigration Servs., Cap Count for H-1B and H-2B Workers for Fiscal Year 2009, [http://sapidalaw.com/newsletter/Cap\\_Count\\_for\\_H1B\\_and\\_H2B\\_visas\\_for\\_2009.pdf](http://sapidalaw.com/newsletter/Cap_Count_for_H1B_and_H2B_visas_for_2009.pdf) (last visited Apr. 20, 2010). There are significant lobbying efforts, particularly on behalf of employers, for expanding or eliminating the cap. Read, *supra* note 14, at 439–40 (discussing argument that cap caused hardships for workers and employers). In response to these efforts, Congress passed the Save our Small and Seasonal Businesses Act of 2005, which created the H-2R category of visa. This exempted returning H-2B workers from the cap if they had participated in the program within the prior three years. *Id.* at 437 (citing data published by U.S. Department of State). There were 71,687 H-2B program participants in 2006, 60,227 in 2007, 94,304 in 2008, and 44,847 in 2009. See U.S. Dep't of State, Report of the Visa Office 2009, *supra* note 22. These figures do not include H-2R visas, which would add 50,854 in 2006 and 69,320 in 2007. *Id.* Issuance of H2R visas ceased at the end of FY2007.

24. §§ 655.122(d), (i); see also DOL, H-2A Certification, *supra* note 16.

25. See Read, *supra* note 14, at 433 (discussing lack of protections for H-2B workers).

26. See Part II.B, *infra*, for a discussion of worker abuses under the two programs.

27. S. POVERTY LAW CTR., *supra* note 3, at 9 (“U.S. employers almost universally rely on private agencies to find and recruit guestworkers in their home countries . . .”).

28. FARM LABOR ORG. COMM., AFL-CIO, LABOR RECRUITMENT IN “GUEST WORKER” PROGRAMS (2007) [hereinafter FLOC, LABOR RECRUITMENT], [http://cgi.unc.edu/programs/mellon/working\\_group\\_papers/LaborRecruitment.pdf](http://cgi.unc.edu/programs/mellon/working_group_papers/LaborRecruitment.pdf).

recruiters' fees.<sup>29</sup> Because most participants are extremely poor, the bulk of this is paid through high-interest loans, often financed by the recruiters themselves.<sup>30</sup> Most are unable to repay the loans in their home countries and have little chance of repaying them through the temporary work under the H-2 programs.<sup>31</sup> Failure to repay their recruitment-fee loans can put workers at risk of losing family homes and businesses used to secure them.<sup>32</sup> Worse still, labor organizations report harassment and retaliation against migrants and their families, which ensures that guest workers remain highly dependent on their U.S. employers for compensation and continued employment.<sup>33</sup>

Recruiters can extract such exorbitant fees by misleading workers regarding their wages, working conditions, and immigration status.<sup>34</sup> For example, in a class action now pending in the Eastern District of Louisiana against Signal International,<sup>35</sup> workers from the United Arab Emirates and India allege they

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29. See S. POVERTY LAW CTR., *supra* note 3, at 9.

30. *Id.* at 10–11 (citing reports from H-2B workers who pay up to twenty-percent interest every month). Workers who have spent their loans on travel and recruitment costs often must borrow more to cover costs in the United States directly from employers. Guerra, *supra* note 4, at 205.

31. S. POVERTY LAW CTR., *supra* note 3, at 11.

32. *Id.* at 11 (“It is almost inconceivable that a worker would complain in any substantial way while a company agent holds the deed to the home where his wife and children reside.”).

33. *Id.* at 1–2; see also Jennifer Hill, *Binational Guestworker Unions: Moving Guestworkers into the House of Labor*, 35 *FORDHAM URB. L.J.* 307, 322 (2008) (asserting fear of recruiter retaliation prevents plaintiffs from coming forward in Mexico); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 *HOFSTRA LAB. & EMP. L.J.* 575, 596–97 (2001); *All Things Considered, Corruption Leads to Deep Debt for Guest Workers* (National Public Radio broadcast May 8, 2007), <http://www.npr.org/templates/story/story.php?storyId=10079556> (describing situation in which recruiter in Thailand threatened guest worker's family after worker spoke to North Carolina newspaper).

34. See, e.g., *Abraham v. Singh*, 480 F.3d 351, 353–54 (5th Cir. 2007) (alleging recruiters misled workers regarding opportunities for permanent residence to induce them to pay program fees); *All Things Considered, Corruption Leads to Deep Debt for Guest Workers*, *supra* note 33. The Southern Poverty Law Center describes the system as “entirely unregulated” and incredibly lucrative, with “more than 121,000 such workers recruited in 2005 alone, [and] tens of millions of dollars in recruiting fees . . . at stake.” S. POVERTY LAW CTR., *supra* note 3, at 9.

35. According to the Southern Poverty Law Center, which filed the suit on workers' behalf, Signal is a subcontractor for global defense contractor Northrop Grumman Corp. Southern Poverty Law Center, Legal Action: David, et al. v. Signal International LLC, <http://www.splcenter.org/legal/docket/files.jsp?cdrID=72&sortID=0> (last visited Apr. 20, 2010).



paid fees from \$12,000 to \$20,000 each.<sup>36</sup> The recruiters allegedly lied to workers about the program's visa opportunities, claiming they would become eligible for permanent U.S. residency.<sup>37</sup> Similarly, plaintiffs in the 2006 case *Castellanos-Contreras v. Decatur Hotels* claim they paid fees between \$3,500 and \$5,000 to work in fifteen luxury New Orleans Hotels following Hurricane Katrina.<sup>38</sup> While the workers were promised a minimum of forty hours per week plus overtime, Decatur provided only twenty-five hours per week or less, and their guest-worker status prevented them from pursuing additional employment.<sup>39</sup> Because Decatur also refused to reimburse plaintiffs' recruitment fees, workers' compensation was well below the minimum wage.<sup>40</sup>

While recruiters are responsible for the initial misdeeds, many employers exploit the ensuing worker vulnerabilities.<sup>41</sup> For example, in a recent North Carolina case, twenty guest workers from Thailand claim they paid \$11,000 each to recruiters who falsely promised them three years of guaranteed agricultural work at \$8.24 per hour.<sup>42</sup> Upon arrival, workers' passports and other documents were confiscated, they were forced to live in squalid conditions without potable water, and they were never paid for significant amounts of work.<sup>43</sup> One year later, plaintiffs in *Aguilar v. Imperial Nurseries* claimed defendants recruited them to work in the North Carolina pine industry but instead transported them to a nursery in Connecticut.<sup>44</sup> According to the

36. See Complaint at 19, *David v. Signal Int'l, LLC*, 588 F. Supp. 2d 718 (E.D. La. 2008) (No. 08-1220).

37. *Id.*

38. See Plaintiffs' First Amended Complaint at 2-3, 488 F. Supp. 2d 565 (E.D. La. 2006) (No. 06-4340); see also S. POVERTY LAW CTR., *supra* note 3, at 10.

39. Plaintiff's First Amended Complaint, *supra* note 38, at 2-3.

40. *Id.* As of July 24, 2009, the federal minimum wage is \$7.25 per hour. 29 U.S.C. § 206(a)(1) (2006); see also U.S. Dep't of Labor, Questions and Answers About the Minimum Wage, <http://www.dol.gov/whd/minwage/q-a.htm> (last visited Apr. 20, 2010). Many states also have minimum wage laws. U.S. Dep't of Labor, Questions and Answers About the Minimum Wage, *supra*.

41. Speaking to NPR, a Legal Aid lawyer in a recent case described how workers' poverty and indebtedness became an advantage for U.S. employers: "[B]ecause of the extreme debt that these workers would come into the United States with, they would work hard and scared, and you could be assured they would never quit." *All Things Considered, Corruption Leads to Deep Debt for Guest Workers*, *supra* note 33.

42. S. POVERTY LAW CTR., *supra* note 3, at 38.

43. *Id.* at 38-39

44. See Complaint at 1, *Aguilar v. Imperial Nurseries*, No. 3-07-cv-193 (JCH), 2008 WL 2572250 (D.Conn. May 28, 2008).

complaint, the employer “confiscated Plaintiffs’ passports . . . restricted Plaintiffs’ travel and communication . . . deprived Plaintiffs of emergency medical care; made fraudulent claims about their ability to effectuate Plaintiffs’ arrest, imprisonment, and/or deportation . . . and generally perpetrated a campaign of coercion and fraud designed to keep Plaintiffs intimidated and unable to leave.”<sup>45</sup>

Other situations are less extreme but still result in payment below the federal minimum wage. In *Rivera v. Brickman*, the defendant employer hired H-2B guest workers for seasonal landscaping.<sup>46</sup> Brickman required workers to apply through designated recruiters in each country. The recruiters charged applicants fees between \$50 and \$155.<sup>47</sup> While plaintiffs’ wages appeared to exceed the program minimum,<sup>48</sup> workers were responsible for their own transportation, the costs of securing passports and work visas, as well as the abovementioned fees. After subtracting these additional costs, the workers’ wages fell below all federal, legal minimums.<sup>49</sup>

Despite rampant abuses, many workers feel they have no option but to stay silent.<sup>50</sup> H-2 participants’ fear of deportation

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45. *Id.* at 2.

46. No. 05-1518, 2008 WL 81570, \*1 (E.D. Pa. Jan. 7, 2008).

47. Plaintiffs’ Motion for Partial Summary Judgment at 25, *Brickman Group, Ltd.*, 2008 WL 81570, at \*1 (No. 05-1518).

48. The H-2B program requires that employers pay wages “equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment” and at or above the federal, state, and local minimum wage. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,021 (Dec. 19, 2008) (discussing how DOL derived final rule); see also 20 C.F.R. § 655.10 (2009) (detailing steps for determining prevailing wage for H-2B certification).

The required wage under the H-2A regulations is the highest of the Adverse Effect Wage Rate (AEWR) “in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.” § 655.105(g) (requiring employers attest they will offer and pay required wage); § 655.108 (delineating steps for wage rate determination); see also Guerra, *supra* note 4, at 192.

49. *Brickman Group, Ltd.*, 2008 WL 81570, at \*1 (finding that wages fell below minimum if costs were considered to be primarily for benefit of employer).

50. See S. POVERTY LAW CTR., *supra* note 3, at 6 (“If the work situation is abusive or not what was promised, the worker has little or no recourse other than to go home. . . . In practical terms, it means that an employee is much less likely to complain about workplace safety or wage issues.”).

makes complaints unlikely.<sup>51</sup> Similarly, their insufficient English language skills and unfamiliarity with U.S. culture and the legal system make them more vulnerable to exploitation than domestic workers.<sup>52</sup> They are also less likely to organize than U.S. workers because their visas and jobs are temporary and they depend on employers for legal employment status.<sup>53</sup>

Both high- and low-level abuse situations negatively impact *all* workers.<sup>54</sup> Since its inception, the guest worker program's policy goals have included preserving employment opportunities for domestic workers and protecting U.S. wages and working conditions against downward pressures caused by employers hiring guest workers.<sup>55</sup> To accomplish these objectives, the program contains provisions that, theoretically, make foreign workers more expensive, including an enhanced wage rate and requirements that employers pay recruitment and other costs.<sup>56</sup> Yet employers can simply use recruiters who charge workers directly to circumvent cost-shifting prohibitions and lower the cost of hiring H-2 workers.<sup>57</sup> Furthermore, employers may find guest worker vulnerabilities allow them to skirt wage and working condition re-

51. *Id.*; Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 3 (2009) ("[Migrants] are often legally, physically, psychologically, financially, and emotionally vulnerable.").

52. Haynes, *supra* note 51, at 5 (finding "the cultural, social, linguistic, and economic transitions that migrants undergo will relegate them . . . to living on the fringes").

53. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 554–55 (2007) ("Recognizing that antagonizing her employer is likely to result in a quick ticket home and a guaranteed slot on future blacklists, an H-2A worker is unlikely to want to take the risk of supporting a union organizing campaign."); see also LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 148–49 (2000) (suggesting agricultural guest worker program impedes unionization). Moreover, U.S. unions have historically been hostile to the guest worker program. Gordon, *supra*, at 553–54 (discussing failure of U.S. unions to organize guest workers).

54. There is extensive scholarship regarding the impact of immigration and temporary migration; however, it is beyond the scope of this Note. See generally Juan Ramon García, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*, at 227–29 (1980); Read, *supra* note 14; Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008).

55. See 20 C.F.R. § 655.0 (2009).

56. Letter from Low Wage Worker Legal Network et al. to Elaine L. Chao, U.S. Sec'y of Labor, *supra* note 8, at 9 (citing the H-2A and H-2B regulations and Part 602 — Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19,101 (Dec. 30, 1964)).

57. See *supra* notes 46–49 and accompanying text.

quirements without fear of reprisal. As wages and working conditions decline for guest workers, they decline for domestic workers as well.<sup>58</sup>

### C. THE H-2 PROGRAM LACKS EFFECTIVE SAFEGUARDS

Both the H-2A and H-2B programs prohibit employers from knowingly charging or permitting agents to charge workers recruitment fees.<sup>59</sup> However, this requirement is relatively easy to avoid where recruiters charge workers directly. While abuses may occur anywhere in the system, field-agent recruiters in the sending country are usually the worst offenders.<sup>60</sup> Thus, employers can quite easily — and sometimes honestly — say they are unaware their workers were required to pay recruitment fees.

Even when a worker can demonstrate employer knowledge, the program provides few remedies. While the DHS may deny or revoke petitions for guest workers where employers knowingly allow recruiters to demand prohibited fees from workers, employers need not reimburse workers.<sup>61</sup> Reimbursement is required only if an employer wishes to apply to hire new workers within a year of the denial or revocation; after one year, the employer may

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58. See Laura Massie, Note, *Workers of the World, Unite?: Politics of Guestworker Protection and U.S. Worker Protection in the Current U.S. Guestworker Debate*, 15 GEO. J. ON POVERTY L. & POL'Y 315, 331 (2008) (quoting AFL-CIO General Counsel Jon Hiatt as opining that an the guest worker program is “driven entirely by the desire of some in the business community to have a constant and exploitable pool of workers,” which takes “a toll on the wages, benefits, and worker conditions of U.S. workers”); see also *supra* note 8 (describing impact of program failures on domestic workers).

59. Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,154–55 (Dec. 18, 2008). The regulations require employers to attest that they will not shift recruiting costs to H-2A workers and will “contractually forbid[] any foreign labor contractor or recruiter whom the employer engages . . . to seek or receive payments from prospective employees.” *Id.* at 77,159–60. The Department recognized that this could mean increased costs to employers and that it intended the extended rule to prevent the creation of “conditions resembling those akin to indentured servitude.” *Id.* at 77,159. However, not all recruitment-related fees would be included. For example, fees associated with passports, visas, and transportation would be excluded. See *Id.* This risks making compliance merely about cost characterization.

60. FLOC, LABOR RECRUITMENT, *supra* note 28.

61. See U.S. Citizenship and Immigration Servs., Questions & Answers: USCIS Finalizes Changes to Improve the H-2A Temporary Agricultural Worker Program, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543ff6d1a/?vgnextoid=28a634a57822e110VgnVCM1000004718190aRCRD&vgnextchannel=3381c0ed71f85110VgnVCM1000004718190aRCRD> (last visited Apr. 20, 2010).

simply reapply.<sup>62</sup> In addition, the DOL has indicated that its power to enforce the regulations is “constrained” where cost-shifting occurs abroad.<sup>63</sup> More importantly, there is ample evidence that neither agency uses even their limited enforcement powers.<sup>64</sup> Because the regulations contain no private right of action that would allow plaintiffs to enforce the provision themselves, reimbursement based on the H-2 regulations seems essentially foreclosed.

Consequently, many plaintiffs have instead relied on the Fair Labor Standards Act (FLSA) to vindicate their rights.<sup>65</sup> The

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62. *Id.* Reimbursement is also not required if the workers cannot be found with “reasonable efforts.” *Id.*

63. Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. at 77,159.

64. Michael Holley describes the DOL complaint system as a “black hole” where officials are not required to respond to complaints. Holley, *supra* note 33, at 592. Guerra lists the following problems with DOL enforcement of H-2A program requirements:

[O]utright lack of enforcement; notice of investigations given to suspected employers; ‘chosen’ employees who ‘volunteer’ to speak to DOL investigators, and who repeatedly deny any such problems or violations; . . . silent workers who are too afraid of losing their jobs to speak to DOL regarding complaints. . . . [and] administrative ‘settlements’ . . . where fines are greatly reduced . . .

Guerra, *supra* note 4, at 201 (footnotes omitted). She suggests this is not due to carelessness but an institutional bias favoring growers. *Id.* at 196. For a discussion of a recent case involving U.S. workers suing the DOL for improperly administering the H-2B program, see Letter from Low Wage Worker Legal Network et al. to Elaine L. Chao, U.S. Sec’y of Labor, *supra* note 8, at 9–10.

According to the Low Wage Worker Legal Network, an umbrella group of over thirty national and international labor-rights organizations, no government agency currently enforces the H-2B program. *Id.* at 13–14. The Network submitted Freedom of Information Act requests to the DOL and DHS for records of complaints filed, investigations conducted, and penalties imposed. In response, the DOL referred the petitioners to the DHS: “I regret to inform you that in fact this agency does not have jurisdiction over the H2B visa program under the Immigration Reform and Control Act of 1986. Your request should have been directed to Department of Homeland Security . . .” *Id.* at 14 (internal quotation marks omitted). The DHS then referred them to the DOL: “We recommend that you redirect your request to the following government agency: Department of Labor, Office of the Solicitor . . .” *Id.* (internal quotation marks omitted). The DOL explicitly denies any enforcement power over the program. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 29,942, 29,942 (proposed May 22, 2008) (to be codified at 20 C.F.R. pts. 655–56) (“Congress has vested the Department of Homeland Security (DHS) with the statutory authority to enforce the H-2B Program requirements and the [DOL] possesses no independent authority for such enforcement . . .”).

65. See, e.g., *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1244–45 (11th Cir. 2002) (declining to decide recoverability “[b]ecause the principles of agency law do not hold the Growers responsible for the recruitment fees”); *Rivera v. Brickman Group, Ltd.*, No.

FLSA requires that employers repay all costs that employees directly pay but are incurred primarily for the employer's benefit.<sup>66</sup> Plaintiffs have argued, somewhat successfully, that travel and visa costs fall into this category and should therefore be reimbursed. In 2002, the Eleventh Circuit ruled in *Arriaga v. Florida Pacific Farms* that H-2A employers must repay travel and visa expenses when employment begins to the extent they would reduce wages below minimum wage.<sup>67</sup> The court reasoned that employers' recruitment of workers in foreign countries causes these expenses. Unlike daily food and lodging, they are not ordinary living expenses that workers pay regardless of employment.<sup>68</sup> However, the court declined to rule whether recruitment fees should also be reimbursed under the FLSA.<sup>69</sup> The court found that the defendants were unaware that recruiters were charging workers. While plaintiffs argued that the employers should nonetheless be liable under the "apparent authority" theory of agency, which does not require the principal's explicit authorization, they were unable to show words or conduct that indicated implied approval.<sup>70</sup> Failing to find an agency relationship, the court found it unnecessary to reach the FLSA question.<sup>71</sup>

*Arriaga* reflects courts' general reluctance to extend employers' liability to recruitment fees absent evidence the employer either explicitly approved the fees or implicitly approved them through a legal agency relationship.<sup>72</sup> Two lower court cases have

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05-1518, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); see also *infra* notes 73–79 and accompanying text.

66. The prohibition on shifting costs primarily for the employer's benefit comes from Department of Labor regulations interpreting FLSA. *Brickman Group, Ltd.*, 2008 WL 81570, at \*8 n.15. Under the FLSA, employers may add the reasonable cost of "board, lodging, or other facilities" to the cash wage when they are "customarily furnished by such employer." 29 U.S.C. § 203(m) (2006). However, an employer may not shift to the employee the costs of goods or services that are "primarily for the benefit or convenience of the employer." 29 C.F.R. §§ 531.3(d)(1), § 531.35 (2009). If an employer does shift such an expense, it is deducted from the cash wage to determine compliance with the FLSA minimum. *Brickman Group, Ltd.*, 2008 WL 81570, at \*7.

67. 305 F.3d 1228, 1242–44 (11th Cir. 2002).

68. *Id.*

69. *Id.* at 1244–45.

70. *Id.* at 1245–46.

71. *Id.* at 1244–45 ("Because the principles of agency law do not hold the Growers responsible for the recruitment fees, we need not discuss whether the recruitment fees are 'other facilities' that require reimbursement under the FLSA.).

72. Though beyond the scope of this Note, recovery under the FLSA might still be expanded through more creative theories of agency. One option might be to analyze the



permitted some recovery of recruitment fees under the FLSA; however, in both cases, the employer was involved in collecting the fees. In 2006, the Middle District of Florida in *Avila-Gonzalez v. Barajas* required the defendant to reimburse H-2A workers for recruitment fees and other expenses to the extent such fees would force workers' compensation below the mandated wage rate.<sup>73</sup> The court distinguished *Arriaga* because the employer in *Avila-Gonzalez* directly collected the fees rather than using a foreign recruiter. While the holding demonstrates how the FLSA potentially applies to recruitment fees, it has the adverse effect of encouraging employers to use foreign recruiters.

The Eastern District of Pennsylvania in *Rivera v. Brickman* issued the second and more promising decision, similarly distinguishing *Arriaga*.<sup>74</sup> Defendant Brickman assigned workers' representatives for each country and explicitly designated these recruiters as its agents for processing visas.<sup>75</sup> Workers were required to go through the designated recruiters to obtain H-2B positions,<sup>76</sup> and Brickman executives acknowledged that they were aware the recruiters charged workers a fee.<sup>77</sup> The court expressly found it unnecessary to rely on agency law and instead emphasized that Brickman's decision to go through recruiters was "to reduce difficulties associated with the H-2B process, and, thus, for Brickman's benefit and convenience."<sup>78</sup> It therefore fell within the FLSA's "primarily for the benefit of the employer" exception.<sup>79</sup>

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recruitment business and its costs. For example, if it could be demonstrated that total recruitment costs include payments to multiple levels, including local agents, then it could also be shown that employers who pay only top-level fees pay less than the full cost, tacitly approving low-level recruiters' cost-shifting.

73. *Avila-Gonzalez v. Barajas*, No. 2:04CV567-FTM-33DNF, 2006 WL 643297 (M.D. Fla. Mar. 2, 2006). In addition to recruitment fees, the court required reimbursement of visa application and issuance fees, travel expenses, and the I-94 border-crossing fee. *Id.*

74. *Rivera v. Brickman Group, Ltd.*, 2008 WL 81570, at \*13-\*14 (E.D. Pa. Jan. 7, 2008).

75. *Id.* at \*13.

76. *Id.* at \*13-\*14.

77. Plaintiffs' Motion for Partial Summary Judgment, *supra* note 47, at 9-10.

78. *Brickman Group, Ltd.*, 2008 WL 81570, at \*13-\*14. While the court acknowledged that *Arriaga* relied on agency law, it distinguished the case because Brickman gave workers no choice but to use its designated recruiters. *Id.*

79. *Id.* For a description of the FLSA exception, see *supra* note 66 and accompanying text.

The employer's direct involvement with the recruiters and knowledge of the fees distinguish *Brickman* from cases where the employer is allegedly unaware of its recruiters' practices. For example, in *Decatur Hotels*, the Fifth Circuit noted that "[a]lthough the record does show that the guest workers knew of no other way to obtain employment with Decatur, the record also shows that Decatur did not require, or approve, any guest worker to pay any sum to anyone as a condition of an H-2B job offer."<sup>80</sup> It thus declined to find liability. Further, the court read the H-2B statute conservatively, finding that workers, not employers, were responsible for visa and transportation costs — explicitly declining to follow *Arriaga's* reasoning.<sup>81</sup>

The DOL's stance on reimbursement is, as the *Brickman* court put it, "not merely unclear, but untenable."<sup>82</sup> In response to comments concerning regulations it promulgated in December 2008, the DOL explicitly rejected *Arriaga's* reading of the FLSA, stating the "better reading" is that "relocation costs" are not primarily for the employer's benefit.<sup>83</sup> Yet, in March 2009, it withdrew this interpretation, stating the "issue warrants further review"<sup>84</sup> and may have reversed its 2008 position in new H-2A regulations proposed in September 2009.<sup>85</sup> The DOL's discussion of its proposed regulations emphasizes prohibitions on shifting recruitment costs to workers and states that visa fees are "directly attributable to the employer's need for the worker to enter the U.S. to work for the employer."<sup>86</sup> However, the agency makes these statements only in the H-2A regulation context, which still lacks a private right of action, and does not state whether this

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80. 576 F.3d 274, 284 (5th Cir. 2009), *reh'g en banc granted*, No. 07-30942, 2010 WL 1039346 (5th Cir., March 18, 2010).

81. *Id.*

82. 2008 WL 81570, at \*10.

83. Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,155 (Dec. 18, 2008) (discussing § 655.104(h), which regulates transportation).

84. Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13,261, 13,262 (interpretation withdrawn Mar. 26, 2009) ("DOL believes that this issue warrants further review. Consequently, . . . DOL withdraws the [December 19, 2008,] FLSA interpretation . . . ." (citations omitted)).

85. Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45,906, 45,918 (proposed Sept. 4, 2009) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R. pt. 501).

86. *Id.*

interpretation extends to the FLSA.<sup>87</sup> Should courts adopt this interpretation,<sup>88</sup> plaintiffs likely still face difficulty recovering where employers willfully disregard actions of their foreign recruiters, because both the FLSA and the H-2 regulations prohibit only “knowing” cost-shifting. These statutory recovery barriers have encouraged plaintiffs to seek redress through alternative means, as discussed in Part III.

### III. RICO, TVPA, AND TORT LIABILITY: THREE SQUARE PEGS

The gaps in protection for migrant workers under the FLSA have prompted advocates to pursue other strategies for recovering recruitment fees. This Part considers three such approaches — the Racketeer Influenced Corrupt Organization Act (RICO), state tort law, and the Trafficking Victims Protection Act (TVPA). Part III.A examines promising claims under RICO, but notes that potential barriers to recovery include limited damages, limited extraterritorial application, and issues of agency that might prevent plaintiffs from suing employers directly. Part III.B explores similar claims and challenges under state common-law tort claims. Finally, Part III.C analyzes three provisions of the TVPA, finding that the statute applies in the recruitment fee context, but perhaps only in the most extreme cases.

#### A. RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT (RICO)

Civil RICO claims under 18 U.S.C. § 1962 have proved to be a promising tool for worker advocates.<sup>89</sup> Although RICO is often thought of as a criminal statute, it provides for civil liability as well.<sup>90</sup> The most common claims are brought under § 1962(c), which prohibits the conduct of business through acts that consti-

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87. *Id.*

88. The *Decatur* court seemed open to such an interpretation, noting that although the new regulations effective January 2009 were inapplicable in that case, it could change its recruitment fee approach in future cases. *See Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 576 F.3d 274, 283 (5th Cir. 2009).

89. *See* S. POVERTY LAW CTR., CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 44–49 (3d ed. 2008), [http://www.splcenter.org/pdf/static/splc\\_human\\_trafficking.pdf](http://www.splcenter.org/pdf/static/splc_human_trafficking.pdf).

90. *See* 18 U.S.C. § 1964 (2006).

tuting a pattern of racketeering activity,<sup>91</sup> where the defendant is employed by or associated with an enterprise and the racketeering activities affect interstate or foreign commerce.<sup>92</sup>

The statute enumerates predicate acts that constitute “racketeering activity,” many of which might apply in the guest worker context.<sup>93</sup> For example, a typical complaint<sup>94</sup> might allege predicate acts of human trafficking,<sup>95</sup> forced labor,<sup>96</sup> visa fraud,<sup>97</sup> mail fraud,<sup>98</sup> wire fraud,<sup>99</sup> robbery, or extortion.<sup>100</sup> While most of the acts covered have corresponding common law tort liability, a cognizable claim under RICO may require proof of different elements.<sup>101</sup> For example, the Supreme Court recently ruled that, unlike in tort, a RICO claim predicated on mail fraud “need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations.”<sup>102</sup> The availability of treble damages for injuries and legal costs makes RICO even more attractive to plaintiffs than a common-law tort claim.<sup>103</sup>

91. A “pattern of racketeering activity” is defined as two or more of the statute’s predicate acts within ten years of each other. See § 1961 for this and other relevant definitions.

92. § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”); see also *Ello v. Singh*, 531 F. Supp. 2d 552, 574 (S.D.N.Y. 2007).

93. See § 1961(1).

94. This list of allegations is from the complaint in *Aguilar v. Imperial Nurseries*. See Complaint, *Aguilar v. Imperial Nurseries*, 2008 WL 2572250 (D. Conn. May 28, 2008) (No. 3:07-cv-0193). For a description of the case, see *supra* notes 44–45 and accompanying text.

95. § 1589(2)–(3).

96. § 1590.

97. § 1546; see also *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 304, 314–15 (3d Cir. 1997) (convicting employers of aiding and abetting visa fraud and corresponding RICO violations when they instructed workers to apply for D-1 foreign maritime crewmen visas rather than H-2, as legally required).

98. § 1341. The elements of mail and wire fraud are: (1) defendant knowingly participated in a scheme to defraud, and (2) the mails or interstate wire facilities were used in furtherance of the scheme. *Id.*; § 1343.

99. § 1343.

100. § 1951.

101. See S. POVERTY LAW CTR., *supra* note 89, at 45 (detailing how to state a claim under RICO).

102. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

103. See § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States

While plaintiffs' attorneys are increasingly utilizing this approach, relatively few courts have ruled on RICO claims in the guest worker context.<sup>104</sup> One reason may be that RICO only recently became applicable to this situation. Trafficking in persons and forced labor, for example, became predicate acts after the Trafficking Victims Protection Act (TVPA) was reauthorized in 2003.<sup>105</sup> Furthermore, promising cases — those that survive motions to dismiss — tend to settle before courts reach the merits.<sup>106</sup>

There are three main barriers to recovering recruitment fees and other damages under RICO in the guest worker context:<sup>107</sup> limited damages; agency requirements; and limited extraterritorial application. Sections A.1 through A.3 will address these barriers in turn.

### 1. *Limits on recoverable damages.*

RICO strictly limits recoverable damages by excluding physical or mental personal injuries. To recover, plaintiffs must show

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district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .”).

104. *But see* Aguilar v. Imperial Nurseries, No. 3-07-cv-193 (JCH), 2008 WL 2572250 (D. Conn. May 28, 2008) (No. 3:07-cv-0193) (ruling favorably on plaintiffs' RICO claims in default judgment); see *supra* notes 44–45 and 94 for case details.

105. Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended at 18 U.S.C. § 1595 (2006), 22 U.S.C. § 7109a (2006)).

106. *See, e.g.,* Does v. Rodriguez, No. 06-cv-00805-LTB, 2007 WL 684114 (D. Colo. Mar 02, 2007). In *Does*, plaintiffs working in rural Colorado brought RICO claims under the TVPA and an involuntary servitude claim under the Thirteenth Amendment of the U.S. Constitution. 18 U.S.C. §§ 1581, 1584 (2006); 42 U.S.C. § 1994 (2005). *See* Complaint and Demand for Jury Trial at 3, *Rodriguez*, 2007 WL 684114 (No. 06-cv-00805-LTB). In addition to suing the employer, plaintiffs sued the contractors that had, for a fee of \$1,300 per worker, “recruited, solicited, hired, transported, and housed” them. *Id.* at 5. Workers were required to repay this fee before leaving employment by the defendant contractors and employer. After the plaintiffs' motion to file anonymously was granted and defendants' motion to dismiss was denied, *Rodriguez*, 2007 WL 684114 (No. 06-cv-00805-LTB), the case settled.

107. A possible fourth barrier to RICO claims is the possibility that the FLSA preempts the claim. *See, e.g.,* Choimbol v. Fairfield Resorts, Inc., No. 2:05cv463, 2006 WL 2631791, at \*6 (E.D. Va. Sept. 11, 2006) (finding FLSA minimum wage and overtime claims precluded plaintiffs' fraud-based RICO claims). The *Choimbol* court relied on the FLSA's comprehensive enforcement scheme and rejected the plaintiffs' argument that RICO complemented the FLSA by providing additional relief for “grand systematic schemes.” *Id.* Courts have found that FLSA claims preclude claims under other Acts. *See, e.g.,* Kendall v. City of Chesapeake, 174 F.3d 437 (4th Cir. 1999) (§ 1983 claims). However, other courts have not yet endorsed *Choimbol*.

defendants' pattern of racketeering activity caused quantifiable injury to their business or property.<sup>108</sup> Because plaintiffs cannot recover for emotional and physical injuries,<sup>109</sup> victims in minimum wage jobs may not obtain substantial damages.<sup>110</sup>

Plaintiffs must also show a direct causal relationship between the injury and the alleged violation, although the statute does not require that the acts directly target the plaintiff's interest.<sup>111</sup> RICO's proximate cause standard includes "the unintended, though foreseeable, consequences of RICO predicate acts."<sup>112</sup> Courts have found allegations of lost wages and even loss of prospective employment sufficient.<sup>113</sup> In the recruitment fee context, plaintiffs can argue that fraudulently obtained fees are directly caused by employer actions and are foreseeable even where employers claim they are unaware of the fees.

## 2. *Barriers to employer liability.*

It is difficult for plaintiffs to sue employers directly under RICO. Employers almost exclusively use international agencies to recruit and hire guest workers.<sup>114</sup> These recruiters generally make visa and travel arrangements — for a fee — and employers have little or no direct interaction with workers until they arrive at the job. For claims based on recruiters' actions abroad, such as collecting fees based on false promises, plaintiffs must attribute recruiters' predicate acts to U.S. employers to hold them vicariously liable. Because employers treat recruiters as external contractors, plaintiffs will rarely be able to establish an employ-

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108. See, e.g., *Leach v. Fed. Deposit Ins. Corp.*, 860 F.2d 1266 (5th Cir. 1988).

109. See, e.g., *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918–19 (3d Cir. 1991).

110. Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2587 (2006).

111. See *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

112. *Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265–68 (1992); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100–01 (N.Y. 1928)).

113. *Diaz*, 420 F.3d at 900–01.

114. S. POVERTY LAW CTR., *supra* note 3, at 9 ("U.S. employers almost universally rely on private agencies to find and recruit guestworkers in their home countries . . .").



ment relationship;<sup>115</sup> thus, the doctrine of respondeat superior is inapplicable.<sup>116</sup>

This does not necessarily preclude liability, but it does raise the bar. To recover, plaintiffs must show that the agent (the recruiter) acted with either actual or apparent authority of the U.S. employer, both of which require an act of encouragement.<sup>117</sup> The court in *Arriaga* faced a FLSA agency claim, but found no encouragement or approval where the employer was unaware that recruiters were charging workers additional fees.<sup>118</sup> Conversely, courts have found agency relationships between employers and U.S. labor contractors, noting the term “contractor” was simply used to avoid liability in what otherwise was an employer-employee relationship.<sup>119</sup>

In addition to a close connection between employer and recruiter, some courts also require that employers benefit from the RICO violation to be liable under an agency theory,<sup>120</sup> such as

115. *See id.*

116. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03(2)(a) (2006) (applying respondeat superior where “the agent is an employee who commits a tort while acting within the scope of employment”). Ironically, a finding of agency can also pose problems for RICO claims. RICO requires an “enterprise” comprised of more than one person or entity that is distinct from the RICO defendant. 18 U.S.C. § 1962(c) (2006). Agency between the recruiter and the employer makes them a single legal actor, which may preclude them from being an enterprise. *See e.g.*, *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (“[A] corporation can only function through its employees and agents. . . . Thus, where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.” (citation omitted)). This distinction arises from the common-law maxim that a person cannot conspire with himself. *See River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992).

117. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03(1)(a), (2)(b) (2006).

118. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1245–46 (11th Cir. 2005); *see also supra* notes 67–71 and accompanying text. This can be contrasted with *Brickman*, where employers designated recruiters as their agents and were aware the recruiters charged fees. No. 05-1518, 2008 WL 81570, \*1 (E.D. Pa. Jan. 7, 2008).

119. *Choimbol v. Fairfield Resorts, Inc.*, 428 F. Supp. 2d 437, 442 (E.D. Va. 2006) (denying motion to dismiss where “finder of fact could determine that [the second defendant], while proclaiming to be a mere contractor, was in fact an employee or otherwise an agent of [the first defendant]”). A close and direct relationship also existed between the contractor or recruiter and employer in *Does v. Rodriguez*, No. 06-cv-00805-LTB, 2007 WL 684114 (D. Colo. Mar. 2, 2007).

120. *See, e.g.*, *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154–55 (9th Cir. 1992) (“Corporations and other employers that have benefited from their employees’ or agents’ RICO violations will be forced to compensate the victims of racketeering activity.”).

where recruiters provide employers with kickbacks.<sup>121</sup> Similarly, because employers do not have to pay for worker recruitment, employers benefit from the recruiters' illegal collection of fees by receiving services free of charge or at a reduced rate. Employers also arguably benefit from having indebted employees because their insecurity allows employers to pay lower wages.<sup>122</sup> These arguments are thus far untested.

### 3. RICO's Extraterritorial Application.

RICO's limited extraterritorial application may prevent plaintiffs from recovering recruitment fees paid to international recruiters before entering the United States. Most circuits hold<sup>123</sup> that RICO can apply extraterritorially "if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here."<sup>124</sup> Plaintiffs must therefore satisfy either the "conduct" or the "effects" test.<sup>125</sup> Both are extremely fact-specific inquiries, and decisions vary broadly.

Applying the effects test in *Bowoto v. Chevron Corp.*, the Northern District of California focused on the economic impact of defendants' actions.<sup>126</sup> In *Bowoto*, African plaintiffs sued defendant Chevron for its Nigerian subsidiary's involvement in attacks on civilians to suppress protests.<sup>127</sup> The plaintiffs pointed out that the defendant shipped substantial oil to the United States and

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121. Kickbacks are usually paid on a per-worker basis. Although the H-2 program prohibits employers from accepting kickbacks, recruiters use them to expand their business.

122. See *supra* notes 51–53 and accompanying text.

123. Some courts maintain that RICO has no extraterritorial application. See, e.g., *Jose v. M/V Fir Grove*, 801 F. Supp. 349 (D. Or. 1991).

124. Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008); see also *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663–64 (9th Cir. 2004) (describing conduct and effects tests); *Doe I v. Unocal Corp.* 395 F.3d 932, 945 (9th Cir. 2002) (same); *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir.1996) (same); *United States v. Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 196–97 (D.D.C. 2007) (same).

125. 77 C.J.S. *RICO (Racketeer Influenced and Corrupt Organizations)* § 1 (2008) ("RICO applies to conduct outside the United States, as long as either conduct material to the alleged crime or directly causing the alleged loss occurred in the United States, or conduct outside the United States directly and foreseeably cause substantial effects within the United States.").

126. 481 F. Supp. 2d 1010 (N.D. Cal. 2007).

127. *Id.* at 1012.

argued that its racketeering activities lowered oil extraction costs and increased profits from oil sold to the U.S., giving it a competitive advantage.<sup>128</sup> The court, however, denied RICO's extraterritorial application, stressing plaintiffs had not presented evidence that Chevron gained a competitive advantage in the U.S. or impacted the U.S. economy.<sup>129</sup> This result was not inevitable. In *Wiwa v. Dutch Petroleum*, the Southern District of New York found the effects test satisfied where the plaintiffs alleged the defendants shipped substantial oil to U.S., the defendants intended economic advantage through acts, and the plaintiffs resided where the oil was extracted.<sup>130</sup>

Other courts have taken a broader approach. In *United States v. Philip Morris USA, Inc.*, the court found defendants violated RICO by misleading the American public regarding the health consequences of low tar cigarettes.<sup>131</sup> An injunction prohibited future violations in the United States and abroad,<sup>132</sup> despite defendants arguing it should be inapplicable overseas.<sup>133</sup> Citing defendants' actions abroad — including extensive health research, use of scientists, and document destruction and concealment — the court found the acts furthered the scheme to defraud the American public and thus the domestic effects of the overseas acts were substantial enough to warrant the injunction.<sup>134</sup>

In *Philip Morris USA, Inc.*, the relevant effects were on the "health and welfare of American smokers."<sup>135</sup> In the guest workers context, an analogous argument could be made that illegal acts abroad attributable to U.S. employers negatively affect American workers.<sup>136</sup> Potentially fatal distinctions include the purpose of

128. *Id.* at 1014.

129. *Id.* at 1014–15.

130. *Wiwa v. Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at \*22 (S.D.N.Y. Feb. 28, 2002).

131. 477 F. Supp. 2d 191, 194 (D.D.C. 2007).

132. *Id.* RICO authorizes reasonable restrictions on future activities through injunctive relief. *Id.* at 195 (upholding injunction prohibiting future RICO violations (citing 18 U.S.C. § 1964(a) (2006))).

133. *Id.* at 196.

134. *Id.* at 197–98 (“The activities which took place abroad were all devoted to advancing and furthering the efforts of the Defendants to mislead and deceive American smokers . . .”).

135. *Id.* at 198.

136. *See supra* notes 54–58 and accompanying text.

the acts and the motivation of the actors.<sup>137</sup> Defendants in *Philip Morris USA, Inc.* sought to defraud Americans to increase sales.<sup>138</sup> The scheme perpetrated by employers of guest workers, however, is not similarly directed at U.S. workers. The effects, including fewer employment opportunities and lower wages, are significant but might be too attenuated.

Direct effects on guest workers might also satisfy the effects test. Given that recruiters collect fees in a worker's home country, which is also his domicile and often his location when the suit is filed, guest workers are directly affected outside of the United States. However, the "effect" in a fraud-based claim could be construed as their decision to work in the United States, or, in a forced labor claim, their inability to leave their employment in the United States — both of which might satisfy the proximate cause standard. Whether these satisfy the effects test hinges on how the court defines "effects." The claim would likely fail if "effects" are analyzed by their financial impact on the U.S. economy, as in *Bowoto*.<sup>139</sup> It would likely succeed if the court instead defined "effects" based on the number of workers entering the U.S., similar to the "substantial amount" of oil entering the U.S. in *Wiwa v. Dutch Petroleum*.<sup>140</sup>

Whether plaintiffs would satisfy the "conduct" test depends largely on the strength of the relationship between employers and recruiters. To satisfy this test, significant RICO-violating conduct must occur in the United States.<sup>141</sup> The conduct must be relevant to the violations, meaning it must further the scheme or be "central to consummation of the racketeering."<sup>142</sup> The Second Circuit stated the acts must be "more than merely preparatory."<sup>143</sup> For example, RICO would not apply "where the sole nexus is utilization of American mail or wires to prepare for or cover up a fraud scheme perpetrated by foreigners against other foreign-

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137. While RICO does not require that acts directly target plaintiffs' interests, there is a foreseeability requirement. *See supra* notes 111–13 and accompanying text.

138. 477 F. Supp. 2d at 196.

139. *See supra* note 129 and accompanying text.

140. *See supra* note 130 and accompanying text.

141. *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007) (describing conduct test).

142. *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008).

143. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

ers.”<sup>144</sup> The relevant acts must also be material, meaning they directly caused the plaintiffs losses.<sup>145</sup> In *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*, the Eleventh Circuit found that conduct sufficiently “material to the completion of the racketeering” occurred in the United States where the defendant transferred funds to and from U.S. bank accounts in a scheme to loot a Dominican bank.<sup>146</sup> While the defendant and the allegedly looted bank were in the Dominican Republic, the court held that Congress intended the bank to have recourse to American courts.<sup>147</sup>

The above-mentioned *Bowoto* case delivered a less plaintiff-friendly ruling on materiality.<sup>148</sup> Plaintiffs presented evidence that U.S.-based Chevron had general control and supervision over its foreign subsidiary, had designed security procedures, and had approved payments related to the attacks.<sup>149</sup> Yet, the court granted defendant’s motion to dismiss, stating the conduct was immaterial because it was “merely preparatory” and did not directly cause the losses.<sup>150</sup> An “extraordinarily close relationship” between the parent and subsidiary was insufficient where there was no evidence the defendants made decisions during the attacks.<sup>151</sup>

Based on these cases, plaintiffs would need to show a strong connection between foreign recruiters and the United States to hold them liable under RICO. The test would almost certainly be satisfied where recruiters are found to be employers’ agents because acts abroad would be legally attributable to employers in the United States. Where employers work through recruiters but claim to be unaware of recruiters’ fraudulent acts, the link is more tenuous. As in *Bowoto*, even if U.S. employers directed the recruitment, they still did not direct the fraudulent acts. Howev-

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144. *Liquidation Comm’n of Banco Intercontinental*, 530 F.3d at 1352.

145. *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007) (“[C]onduct in the United States . . . must be material, that is, directly cause the losses.” (quoting *Continental Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 420 (8th Cir. 1979))).

146. 530 F.3d at 1352.

147. *Id.*

148. *See supra* notes 126–29.

149. *Bowoto v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007).

150. *Id.*

151. *Id.*

er, in some instances, a sufficient connection might still be established. For example, “kickbacks” recruiters pay to U.S. employers using funds collected from worker fees might satisfy the conduct test under *Liquidation Commission*.<sup>152</sup>

RICO’s coverage of multiple acts makes it a promising approach for guest workers. However, its limitation on damages, application to employers, and extraterritorial application present potential barriers to its successful utilization.

## B. COMMON-LAW TORT CLAIMS

Tort law is another common approach to address problems of guest worker abuse.<sup>153</sup> Because these civil claims operate independently of labor law, they avoid some of the labor statutes’ damages recovery issues. Tort claims may also provide courts with greater flexibility in awarding damages. While the judiciary has been hesitant to interfere with executive agencies or congressionally mandated rules and regulations, courts have traditionally guided the development of tort doctrine.<sup>154</sup> For this reason, scholars have advocated for this approach in the human trafficking context.<sup>155</sup> However, tort claims for recruitment fees require a wrongful act independent of shifting recruitment costs to workers, which may not be present in every case.<sup>156</sup>

Although specific doctrines differ by state, common-law tort claims are frequently used in migrant worker litigation.<sup>157</sup> These

152. 530 F.3d at 1351–52; *see also supra* note 124 and accompanying text.

153. *See* S. POVERTY LAW CTR., *supra* note 89, at 67–70 (providing overview of tort law frequently used in trafficking cases).

154. *See* Note, *supra* note 110, at 2589 (advocating the tort law approach “because it has traditionally evolved in response to changing social circumstances and needs” and courts may be more responsive to tort claims against traffickers).

155. *Id.*

156. In other words, plaintiffs cannot sue for the cost shifting because current law does not provide such a right of action. Instead, they must show that there was a separate wrong — for example, the employer fraudulently provided false information — which provides an additional element of proof.

157. For examples of claims and cases, *see* S. POVERTY LAW CTR., *supra* note 89, at 67–70. Because these claims differ by state, this Note does not address the specifics of each. Rather, it discusses the general benefits and challenges of pursuing recovery through tort law.

Another potential tool is the Alien Tort Claims Act (ATCA). 28 U.S.C. § 1350 (2006). Some advocates view claims under the ATCA as a promising strategy for recovering damages from recruitment abuses. *See, e.g.,* Juan Carlos Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*,



claims provide plaintiffs' lawyers with many of the same causes of action as under RICO, without the elements that make RICO claims more difficult to prove.<sup>158</sup> Some of the claims most commonly used by migrant rights advocates include: intentional infliction of emotional distress;<sup>159</sup> false imprisonment;<sup>160</sup> unjust enrichment;<sup>161</sup> and fraud or deceit.<sup>162</sup> Fraud and deceit claims are probably the most promising tort claims for recovering recruitment fees.<sup>163</sup> Plaintiffs can argue they reasonably relied on defendants' fraudulent representations when deciding to pay recruiters; their payments should therefore be recoverable as damages.<sup>164</sup>

While migrant plaintiffs should continue to consider this approach, it has drawbacks. First, the statute of limitations for many common-law tort claims is only one year.<sup>165</sup> Next, tort claims do not generally carry treble damages, which make RICO claims particularly attractive. Plaintiffs seeking recovery of re-

34 DENV. J. INT'L L. & POL'Y 321, 343–45 (2006) (“[M]igrant workers . . . may have a litigation tool in the ATCA to address employers’ failure to pay, as well as other rights that *Hoffman* has restricted.”). However, the U.S. Supreme Court has indicated it will reject such expansions of the doctrine. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 728 (2004) (warning that judges today should exercise “great caution” in recognizing additional causes of action under the ATCA).

158. While elements of proof for a given predicate act, for example fraud, may be the same, RICO claims require additional elements, including a “pattern,” involving two or more predicate acts, and involvement in an “enterprise.” See *supra* notes 91–92 and accompanying text. Similarly, while tort law provides for various compensatory and punitive damages, recovery under RICO is limited to quantifiable injury to business or property. S. POVERTY LAW CTR., *supra* note 89, at 67; see also *supra* Part III.A1.

159. See RESTATEMENT (SECOND) OF TORTS § 46 (2009).

160. See *e.g.*, *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1274–75, 1291 (N.D. Okla. 2006) (finding words and conduct inducing plaintiff to believe “resistance or physical attempts to escape . . . would be useless and futile” may constitute false imprisonment); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 334–35 (D.N.J. 2005) (Wal-Mart employees who were locked in store at night made out a claim of false imprisonment).

161. See *Choimbol v. Fairfield Resorts, Inc.*, 428 F. Supp. 2d 437, 442 (E.D. Va. 2006) (denying motion to dismiss unjust enrichment claim when plaintiffs were required to pay deposit as condition of work).

162. See *e.g.*, *Chellen*, 446 F. Supp. 2d at 1290; S. POVERTY LAW CTR., *supra* note 89, at 69 (discussing fraudulent misrepresentation in trafficking cases).

163. While other claims may provide additional relief, claims for recovery of recruitment fees would likely lack causation. For example, arguing that intentional infliction of emotional distress or false imprisonment caused workers to pay fees would be difficult.

164. Proof of fraudulent misrepresentation involves showing defendant knowingly made misrepresentations to induce the plaintiff’s action. S. POVERTY LAW CTR., *supra* note 89, at 69. Plaintiffs must show they reasonably relied on the representation to their detriment and damages. *Id.*

165. *Id.* at 67.

cruciating costs may also have difficulty holding employers vicariously liable for the acts of their foreign recruiters. Plaintiffs face the same agency problems as those faced by RICO plaintiffs.<sup>166</sup> Even if a plaintiff overcomes agency hurdles, the fraudulent acts may be considered to have occurred abroad, where the recruiters' statements were made and the fees collected. State tort law rarely applies extraterritorially.<sup>167</sup>

Forum non conveniens presents an additional hurdle. Direct suits against recruiters are particularly vulnerable to dismissal for forum non conveniens because the events occur abroad between two foreigners.<sup>168</sup> Irrespective of whether a court finds agency, suits against U.S. employers may also be susceptible to dismissal for forum non conveniens if plaintiffs are abroad when the tort occurs. In *Piper Aircraft v. Reyno*, the leading authority on forum non conveniens, the Supreme Court dismissed a case brought by British plaintiffs.<sup>169</sup> The Court held that dismissal is appropriate when the choice of forum places a heavy burden on the defendant or court and the plaintiffs' interests do not overcome that burden.<sup>170</sup>

Although there is generally a strong presumption favoring plaintiffs' choice of forum, courts give much less deference to foreign plaintiffs.<sup>171</sup> In the guest worker context, both employers and recruiters would likely emphasize the lack of tortious conduct within the United States, as recruiters made promises and collected fees abroad. Similarly, the primary witnesses — plaintiffs and recruiters — are likely located abroad. Therefore, the defen-

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166. See *supra* Part III.A.2.

167. Whether state statutes and common law apply abroad is an issue of state law, and is typically left to the courts. AM. BAR ASS'N., EXTRATERRITORIAL APPLICATION OF U.S. LAW 9 (2000), available at <http://www.abanet.org/labor/lel-aba-annual/papers/2000/outtenextra.pdf> (analyzing extraterritorial application of state wrongful termination laws). However, few, if any, state statutes specifically refer to extraterritorial application. *Id.*

168. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 244, 255 (1981) (foreign forum preferable where accident occurred and "real parties in interest" were located abroad).

169. 454 U.S. at 235.

170. *Id.* at 249. This is essentially a balancing test weighing public and private interests. There must be an alternative forum where the plaintiff may seek recovery. *Id.* at 255–56. While courts may weigh the plaintiff's interest in the chosen forum's favorable substantive law, it should not be given substantial weight. *Id.* at 247.

171. *Id.* at 255–56 ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum. . . . [H]owever, [it] applies with less force when the plaintiff or real parties in interest are foreign.").

dants might point to a dearth of evidence in the United States. The only activity in the U.S. giving rise to fraud might be wire and mail services, but the Supreme Court explicitly found these facts unpersuasive in *Piper*.<sup>172</sup>

Finally, the Fair Labor Standards Act (FLSA) may preclude common-law tort claims.<sup>173</sup> While neither the FLSA nor its legislative history explicitly addresses preemption, courts have inferred a congressional intent to make the FLSA exclusive in certain cases.<sup>174</sup> Specifically, most courts hold that the FLSA preempts state claims at least where the statute directly addresses the issue and provides for the same relief sought under common law.<sup>175</sup>

### C. THE TRAFFICKING VICTIMS PROTECTION ACT

The Trafficking Victims Protection Act (TVPA) of 2000 is the most recent addition to the worker advocate's arsenal. It targets severe forms of trafficking in persons, including sex and labor trafficking that involves force, fraud, or coercion.<sup>176</sup> Relevant prohibitions include: § 1589 (forced labor); § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor) ("trafficking"); and § 1351 (fraud in foreign labor contracting) ("contracting fraud").<sup>177</sup> The TVPA includes criminal provisions,

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172. See 454 U.S. at 235.

173. 29 U.S.C. §§ 201–219 (2006).

174. *Choimbol v. Fairfield Resorts, Inc.*, No. 2:05cv463, 2006 WL 2631791, at \*5 (E.D. Va. Sept. 11, 2006); see also *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1028–29 (N.D. Cal. 1972) ("[T]he provision of one detailed remedy, which necessarily works to define the substantive right to be enforced, would exclude the possibility of alternative remedies in the absences of a clear showing that Congress intended such alternatives . . .").

175. *Choimbol*, 2006 WL 2631791, at \*5–\*6 (dismissing plaintiffs common-law unjust enrichment and fraud claims as preempted by FLSA minimum wage and overtime claims). Other courts have declined to find preemption. See, e.g., *Washington v. Fred's Stores of Tenn., Inc.*, 427 F. Supp. 2d 725 (S.D. Miss. 2006).

176. Edward Babayan, *Legislative Watch*, HUM. RTS. BRIEF, Spring 2007, at 53, 54.

177. Sections 1593A and 1351 were both added to the TVPA through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008). Pub. L. No. 110-457, 122 Stat. 5044 (to be codified at 18 U.S.C. §§ 1351, 1593A). Section 1593A, "Benefiting financially from peonage, slavery, and trafficking in persons," provides for fines or imprisonment for those who benefit from TVPA violations if they did so knowingly or in reckless disregard of the violations. § 1593A. While this provides another potential opportunity for liability, it is beyond the scope of this Note. The TVPA contains many other provisions addressing trafficking in the United States and abroad. It authorizes reports on efforts overseas to combat trafficking, sets minimum standards for foreign

as well as a private right of action for damages.<sup>178</sup> It was passed in 2000 to supplement the prohibition against involuntary servitude under 18 U.S.C. § 1584.<sup>179</sup> In the 1988 *United States v. Kozminski* decision, the Supreme Court interpreted “Involuntary Servitude” to require the use or threatened use of physical force or abuse of legal process, thereby excluding involuntary servitude achieved through psychological coercion.<sup>180</sup> Congress responded to *Kozminski* with the TVPA by expanding the types of coercion that qualify as forced labor and providing new tools to combat trafficking.<sup>181</sup>

The TVPA provides plaintiffs with two options for recovery. First, if the government brings a criminal case, plaintiffs are entitled to mandatory restitution.<sup>182</sup> Second, since the Act’s reauthorization in 2003, plaintiffs may bring federal civil suits to recover actual and punitive damages, as well as attorneys fees.<sup>183</sup> Victims may also bring civil RICO claims, under which forced labor is a predicate act.<sup>184</sup> Trafficking victims are eligible for additional benefits. They may apply for T and U-visas, which allow transition to permanent resident status.<sup>185</sup> Once the U.S. Department of Health and Human Services certifies them, they may also receive the same benefits and services under federal and

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countries to follow in addressing trafficking abroad, provides benefits for trafficking victims, and promotes public awareness campaigns. Babayan, *supra* note 176, at 54.

178. § 1595.

179. U.S. Dep’t of Justice, Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced [hereinafter DOJ, Statutes Enforced], <http://www.usdoj.gov/crt/crim/1581fin.htm> (last visited Apr. 22, 2010).

180. 487 U.S. 931, 948–49 (1988) (limiting § 1589 “to cases involving the compulsion of services by the use or threatened use of physical or legal coercion” and rejecting psychological coercion).

181. *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004) (“[S]ection 1589 was intended expressly to counter *United States v. Kozminski*.” (citation omitted)); DOJ, Statutes Enforced, *supra* note 179.

182. § 1593.

183. § 1595; *see also* U.S. Dep’t of Health and Human Servs., Fact Sheet: Trafficking Victims Protection Act of 2000, [http://www.acf.hhs.gov/trafficking/about/TVPA\\_2000.html](http://www.acf.hhs.gov/trafficking/about/TVPA_2000.html) (last visited Apr. 22, 2010).

184. U.S. Dep’t of Health and Human Servs., Fact Sheet: Trafficking Victims Protection Act of 2000, *supra* note 183. RICO claims were added as part of the 2003 Reauthorization Act. *Id.*

185. Babayan, *supra* note 176, at 54. TVPRA 2008 modified T and U visa provisions to provide additional protections. *See* 8 U.S.C.A. § 1375b (West 2010); *see also* Statement by Rep. Howard Berman before the House of Representatives in support of the William Wilberforce Trafficking Victims Reauthorization Act of 2008 (Dec. 10, 2008).

state-funded programs as refugees, such as refugee cash, medical assistance, and social services.<sup>186</sup>

While case law is still scarce, the TVPA is becoming more common in migrant workers claims and has had some success.<sup>187</sup> However, courts thus far have found liability under the TVPA in only the most extreme cases of forced labor.<sup>188</sup> The following sections explore the three claims available under the TVPA — forced labor, trafficking, and contracting fraud — and analyze the likelihood of plaintiffs' success in each.

### 1. *Forced Labor, 18 U.S.C. § 1589.*

The most successful claims under the TVPA have been under Forced Labor, § 1589 of Title 18. Section 1589 makes it unlawful to provide or obtain the labor or services of a person: by threats of serious harm to, or physical restraint against, that person or another person; or by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or by means of the abuse or threatened abuse of law or the legal process.<sup>189</sup> Violators may face a fine and/or imprisonment not to exceed 20 years.<sup>190</sup>

Most guest worker litigation turns on whether the harms threatened are “serious” enough to compel the worker to provide labor. What constitutes “serious harm” has been a major point of

186. Statement by Rep. Howard Berman, *supra* note 185.

187. According to a Southern Poverty Law Center manual published in October 2008, more than twenty civil lawsuits have been filed under the TVPA since the private right of action was added in 2003. S. POVERTY LAW CTR., *supra* note 89, at 29. Many settled without trial, some were stayed pending criminal prosecutions, and others are in discovery. *Id.*

188. See discussion *infra* Part III.C.1.

189. 18 U.S.C. § 1589 (2006); DOJ, Statutes Enforced, *supra* note 179. To explain “scheme, plan, or pattern,” the conference report gave the example of a worker who is caused to believe that “her family will face harms such as banishment, starvation, or bankruptcy in their home country.” S. POVERTY LAW CTR., *supra* note 89, at 33 (quoting H.R. Rep. No. 106-939, at 101 (2000)). Abuse of legal process includes threats of deportation or visa revocation. DOJ, Statutes Enforced, *supra* note 179; see also § 1589 (clarifying term “abuse or threatened abuse of law or legal process”).

190. § 1589.

contention.<sup>191</sup> Seeking to clarify the issue, Congress recently enacted § 1589(c)(2) under the 2008 reauthorization act. Section 1589(c)(2) defines serious harm as any harm “sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances.”<sup>192</sup> It explicitly covers both physical and nonphysical harm, including psychological, financial, and reputational harm.<sup>193</sup> According to the House of Representatives conference report accompanying the legislation, “serious harm” was intended to encompass subtle methods of coercion, “such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence.”<sup>194</sup> A jury instruction upheld by the First Circuit in *United States v. Bradley*<sup>195</sup> stated: “[A] threat of serious harm includes . . . threats of any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services.”<sup>196</sup> However, the court noted that in some situations, a court would be required to draw a line between improper threats or coercion and permissible warnings of adverse but legitimate consequences.<sup>197</sup>

In the case of migrant workers, plaintiffs could argue that employers threaten them with serious financial harm due to the amount of debt they were required to incur to participate in the program and the lack of opportunity to repay it in their home country. They could argue that this is sufficient to coerce a reasonable person to perform work they otherwise would not, in conditions far below those they would otherwise accept. Because the statute allows courts to take into account the plaintiffs’ back-

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191. See S. POVERTY LAW CTR., *supra* note 89, at 31–32. Defendants have attempted to challenge the statute as void for vagueness. See, e.g., *United States v. Calimlim*, 538 F.3d 706, 712 (7th Cir. 2008) (rejecting argument that “serious harm” was too vague and overbroad to pass constitutional muster); *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22938040, at \*14–\*15, \*17 (W.D.N.Y. Dec. 2, 2003) (same).

192. § 1589(c)(2).

193. *Id.*

194. H.R. Rep. No. 106-939, at 101 (2000).

195. 390 F.3d 145 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1101 (2005).

196. *Id.* at 150.

197. *Id.* at 151.



ground and circumstances,<sup>198</sup> workers might emphasize their particular vulnerabilities as foreigners, including their unfamiliarity with the U.S. legal system. Workers could argue that employers exploit this situation and force workers to accept poor conditions through threats of deportation. However, employers would likely counter, citing *Bradley*, that threatening to fire a worker is a permissible warning of legitimate consequences.<sup>199</sup>

The distinction between legitimate threats of dismissal and threats of deportation amounting to “threatened abuse of law or legal process”<sup>200</sup> is particularly difficult to define in the guest worker context where the former inevitably results in the latter. However, even absent explicit threats, plaintiffs might argue that employers used a “scheme, plan, or pattern” intended to induce fear of serious financial harm to secure plaintiffs’ labor. Plaintiffs could argue that, because they were in debt and lacked other opportunities to repay it, they legitimately feared serious financial harm if they did not do as they were told. To succeed, plaintiffs would need to show that they felt they had no choice but to continue to work.<sup>201</sup>

For example, in *Bradley*, victims were told they had to repay the costs of their flights to the United States before they could leave.<sup>202</sup> The First Circuit found a climate of intimidation because the defendants hindered the workers’ efforts to seek treatment for injuries and medical care and kept tabs on the men’s whereabouts, although they traveled on their own in the neighborhood and elsewhere.<sup>203</sup> The court found the defendants’ actions coer-

198. See *supra* note 192 and accompanying text.

199. Employers often make this argument. See, e.g., *Ramos v. Hoyle*, No. 08-21809-CIV, 2008 WL 5381821, at \*4 (S.D. Fla. Dec. 19, 2008) (declining to dismiss plaintiffs’ § 1589 claims where defendants argued their threat that plaintiffs would lose immigration status if they left job was “truthful statement and not an abuse of legal process”).

200. 18 U.S.C. § 1589(a)(3) (2006).

201. Notably, the fact that a victim was compensated does not preclude a finding of forced labor. *Bradley*, 390 F.3d at 154 (“Whether a person is paid a salary or a wage is not determinative of the question of whether that person has been held in forced labor. . . . [I]f a person is compelled to labor against his will by any one of the means prohibited by the forced labor statute, such service is forced, even if he is paid or compensated for the work.”).

202. *Id.* at 149.

203. *Id.* at 149, 153 (“The government . . . need not prove physical restraint; such as, the use of chains, barbed wire, or locked doors, in order to establish the offense of forced labor. The fact that Mr. Hutchinson or Mr. Flynn may have had an opportunity to flee is not determinative of the question of forced labor if either or both of the defendants placed

cive because they confiscated passports, threatened violence toward an employee who ran away, and scrutinized and restricted the victims' local travel.<sup>204</sup> These facts were sufficient to demonstrate defendants' intent or plan, and thus constituted a pattern of intimidation.<sup>205</sup> The court noted that plaintiffs' allegations of poor living conditions would not be relevant to a forced labor claim.<sup>206</sup>

In *United States v. Chang*, the Fifth Circuit found a violation of § 1589 where the defendant forced immigrant women from Korea to work at his nightclub.<sup>207</sup> The women were required to live at his house and work at his club until they repaid their debts.<sup>208</sup> To enforce this, Chang held the women's passports and executed contracts requiring them to repay their smuggling debts.<sup>209</sup> The women needed Chang's permission to leave the house, which was equipped with a video surveillance system to monitor their entries and departures, and escorts monitored the women's actions.<sup>210</sup>

It is unclear whether recruitment fees are recoverable as damages. While the debt helps keep the worker in peonage, it may be difficult to argue that recruitment fees are damages "caused" by forced labor — unlike, for example, a fraud claim in which fraud induced the payment. Even if other available remedies, such as psychological or mental damages, are large enough to cover the recruitment fees, this is at best an indirect way of holding employers liable for a clearly unacceptable practice. If damages amount to less than the amount paid in fees, it may not be worthwhile for a victim to bring such an action. Even if they win, workers will be stuck with the debt; if they lose, they may face deportation. In either scenario, they may face retaliation through blacklisting or worse.<sup>211</sup>

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Mr. Hutchinson or Mr. Flynn in such fear or circumstances that he did not reasonably believe he could leave.”).

204. *Bradley*, 390 F.3d at 152.

205. *Id.* at 155.

206. *Bradley*, 390 F.3d at 154.

207. 237 F. App'x. 985, 986 (5th Cir. 2007).

208. *Id.*

209. *Id.*

210. *Id.*

211. Many labor rights organizations have found blacklisting to be common practice among employers, labor contractors, and recruiters. See, e.g., S. POVERTY LAW CTR., *supra*

These cases demonstrate that Forced Labor claims provide potential recovery for migrant workers who find themselves in similarly coercive work situations. However, the standard is quite high and involves heavily fact-specific inquiries regarding numerous and diverse acts. Even if courts deem recruitment fees to be recoverable, knowing which facts will lead to recovery is far from predictable. A simple failure to repay recruitment costs, despite its consequences, is not likely to suffice. For this reason, this Note argues for comprehensive coverage that holds employers responsible for workers' recruitment fee debts even when other extreme factors are missing.<sup>212</sup>

## 2. *Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor 18 U.S.C. § 1590*

Section 1590 makes it unlawful to knowingly recruit, harbor, transport, provide, or obtain any person for labor or services under conditions that violate any of the offenses contained in Chapter 77 of Title 18.<sup>213</sup> The inclusion of "obtains," in addition to recruits, implies inclusion of employers as well as more traditional traffickers.<sup>214</sup> In fact, § 1590 claims have been tacked onto § 1589 claims against U.S. employers, but, as of yet, it does not appear to have been used against foreign recruiters.<sup>215</sup> One reason for this may be the difficulty of gaining jurisdiction over claims against foreign recruiters. Courts have generally found that forced labor

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note 3, at 17 (describing North Carolina Growers Association blacklist); COMPA, *supra* note 53, at 148–49.

212. *See infra* Part IV.

213. 18 U.S.C. § 1590 (2006); *see also* DOJ, Statutes Enforced, *supra* note 179. It provides liability for anyone who "knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter." § 1590(a). Victims of § 1590 violations have a private right of action under § 1595.

214. *See id.* at 30. However, its title implies § 1590 was intended to apply to situations distinct from forced labor under § 1589.

215. Generally, § 1590 has been used against employers and U.S. based recruiters. *See, e.g.,* Does v. Rodriguez, 06-cv-00805-LTB, 2007 WL 684114 (D. Colo. Mar 02, 2007); Memorandum in Opposition to Defendants' Motion to Dismiss, Cruz v. Toliver, No. 5:04CV231-R, 2005 WL 3817523 (W.D. Ky. Jan. 21, 2005) (alleging violations of § 1590, as well as 13th Amendment, contract, and tort claims). In *Toliver*, the TVPA claims ultimately were rejected by the jury. 2007 WL 1031621. For discussion of *Does v. Rodriguez*, see *supra* note 106 and accompanying text.

claims under the TVPA do not have extraterritorial application, a ruling that would likely apply to Trafficking claims as well.<sup>216</sup>

However, Congress recently amended the TVPA to expand its jurisdictional reach. The new § 1596 gives courts extraterritorial jurisdiction where the alleged offender is a U.S. national, permanent resident, or if they are present in the U.S., irrespective of nationality.<sup>217</sup> While the addition of extraterritorial jurisdiction may make claims against U.S. employers more accessible, because recruiters are generally not U.S. residents, they must be present in the United States for the extraterritoriality grant to apply.<sup>218</sup>

There remains another potential barrier to recovery against both U.S. employers and foreign recruiters. The statute's text appears to require that workers are trafficked into a situation found to violate the TVPA's other provisions, such as Forced Labor.<sup>219</sup> Because Trafficking claims have been brought almost exclusively in conjunction with Forced Labor claims, the rulings have generally mirrored one another, and it is unclear whether a Trafficking claim could apply independently.<sup>220</sup> An argument could certainly be made that Trafficking claims are independent

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216. See *Nattah v. Bush*, 541 F. Supp. 2d 223, 234–35 (D.D.C. 2008) (no civil remedy for § 1589 violations abroad); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1002–04 (S.D. Ind. 2007) (same). The *Bridgestone* court relied on the presumption that, absent evidence to the contrary, statutes apply only within U.S. territory. 492 F. Supp. 2d at 999–1000. Finding no reference in the statute text, the court determined Congress intended it to only apply in the domestic context. *Id.* at 1002 (“Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so.”). The court rejected the plaintiffs’ argument that the international nature of trafficking crimes demonstrated contrary intent. *Id.* This rationale applies equally to § 1590, which also lacks extraterritoriality language. § 1590. However, the TVPA does not explicitly foreclose extraterritorial application, and advocates may still argue for this extension. S. POVERTY LAW CTR., *supra* note 89, at 34.

217. 18 U.S.C.A. § 1596 (West 2010). Section 1596 covers both forced labor and trafficking offenses. § 1596(a). The section exempts offenses foreign governments are currently prosecuting. § 1596(b). Notably, the additional jurisdiction does not apply to § 1351, contracting fraud. Perhaps this is because § 1351 offers broader extraterritorial application. Section 1351’s broad language may provide for jurisdiction over foreign defendants even absent presence in the United States.

218. See *supra* note 217 and accompanying text.

219. § 1590 (“Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services *in violation of this chapter* shall be fined under this title or imprisoned not more than 20 years, or both.” (emphasis added)).

220. See, e.g., *Rodriguez*, 2007 WL 684114; Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 215.

of, and should not be reliant on, a finding of Forced Labor violations against a separate defendant.<sup>221</sup>

### 3. *Fraud in Foreign Labor Contracting 18 U.S.C. § 1351*

The most recent reauthorization adds a new crime to the TVPA. The new section, under 18 U.S.C. § 1351, prohibits the recruiting, solicitation, or hiring — with intent to defraud — foreign persons to be employed in the United States through false pretenses, representations, or promises about their employment. According to the Congressional Record, this includes representations regarding such issues as terms and conditions of employment, housing, labor broker fees, employer or broker-provided food and transportation, ability to work outside of the offered place of employment, and other material aspects of the recruited person’s work and life in America.<sup>222</sup> This statute is intended to capture situations in which exploitative employers and recruiters have lured heavily-indebted workers to the United States, even if they did not obtain their labor or services through coercion sufficient to reach the level of other TVPA offenses.<sup>223</sup>

It is not yet clear how litigation under this section will play out. While it is directly aimed at some of the abuses this Note addresses, there are at least two potential stumbling blocks. First, given that litigation under this section will likely involve two foreign citizens and an act that took place abroad, defendants will likely rely heavily on forum non conveniens. Courts have dismissed similar cases, particularly when defendants consent to suit abroad.<sup>224</sup> However, the express congressional mandate to

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221. If separate, this section may broaden the application of the TVPA’s other provisions. The reference to any action “in violation of this chapter” has been interpreted as a “catchall” that incorporates all the TVPA’s trafficking-related violations, including those that otherwise do not have a private right of action. S. POVERTY LAW CTR., *supra* note 89, at 30. Such an interpretation could offer private rights of action for all TVPA violations, including document theft under § 1592 or attempt under § 1594(a), and a defendant need only “recruit[], harbor[], transport[], provide[], or obtain[]” the victim, not force labor. *Id.* Independent of § 1590, these additional sections do not provide private causes of action. *See id.*

222. *See* Statement by Rep Howard Berman, *supra* note 185.

223. *Id.*

224. *See, e.g., In re Union Carbide Corp. Gas Plant Disaster*, No. MDL 626, 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992) (dismissing claim where defendant consented to suit in India).

decide such cases through § 1351 may sway courts to accept jurisdiction. A second and related issue is the enforcement of judgments. This too stems from the location of recruiters in workers' home countries. A final concern, though not necessarily a stumbling block, is the lack of accountability for employers. As Part IV will discuss, a just guest worker program requires that employers be held accountable for the acts of their recruiters to fully protect domestic and foreign workers.

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While each of the three approaches discussed in this Part may provide some form of recovery, each has significant flaws — at least in terms of application in the recruitment fee context. Common among them are doubts as to extraterritorial application. Similarly, given the non-employment nature of employer-recruiter relationships, questions of vicarious liability arise under each approach, often precluding recovery against employers absent proof they approved the scheme. Finally, none of the three provisions directly addresses the problem at hand, and it remains unclear how successfully — and consistently — advocates will be able to reshape claims to fit these molds. For these reasons, Part IV advocates a new, tailored approach to workers' recovery.

#### IV. A NEW MOLD: THE ARGUMENT FOR STRICT LIABILITY

Guest workers currently lack adequate means to combat employer abuse and to seek recovery of recruitment fees that leave them vulnerable to exploitation. In theory, the H-2 program prohibits such exploitation, but it lacks adequate enforcement mechanisms. While the legal mechanisms addressed in Part III provide some redress, none are designed to deal with this particular problem.<sup>225</sup> For this reason, Part IV of this Note advocates for

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225. While not directly addressing recruitment fee recovery, there have been other proposals to combat similar abuses, such as more extensive criminal liability for forced labor claims. However, criminal approaches can also be overly reliant on government enforcement. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 92 (2002). And criminal prosecutions require the higher, "beyond a reasonable doubt," burden of proof; while civil cases require only a



a new policy approach that makes clear that exploitative recruitment fees are prohibited — whether they are deducted by employers or paid by workers directly — and provides workers with a means to recover fees paid to recruiters in their home countries. This approach could be implemented in various ways, including by expanding the current H-2 regulations. In order to be effective, this Note argues that the new policy should contain three basic elements. First, exploitative fees should be defined as those that bring the guest worker's first week's salary below the federal minimum wage — if not the minimum program-required wage.<sup>226</sup> Second, it must include a private right of action that permits workers to initiate enforcement and recovery. Finally, employers should be held strictly liable for any fees paid that bring wages below the federal minimum. Part IV.A will discuss these three requirements in more detail. Part IV.B will provide suggestions as to how this policy change might be implemented.

#### A. SUBSTANCE OF THE PROPOSED POLICY CHANGES

First, the policy should require reimbursement of recruitment fees to the extent they bring the guest worker's first week's salary below the federal minimum wage. Not all recruitment fees result in debt that rises to the level of peonage, and one could argue that employers should be held liable only for fees that result in

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preponderance of the evidence. S. POVERTY LAW CTR., *supra* note 89, at 67 (advising plaintiffs to pursue tort litigation absent criminal prosecution).

Another creative option offered this summer in the *Memphis Law Review* suggested that a new upfront reimbursement structure be created within the certification process. Bryce W. Ashby, Note, *Indentured Guests — How The H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 916–17 (2008). Employers would be required to set aside funds into a DOL escrow account to reimburse workers for travel, visa, and other fees in order to receive certification. Assuming DOL standards were amended to explicitly require reimbursement of recruitment fees, this system could provide swift repayment. However, the escrow account plan is more difficult to administer for recruitment fees than for the other fees the author intended it to cover for two reasons. First, recruitment fees are far less predictable than visa and travel costs, particularly when they are based on false information regarding the job opportunity. In many cases the escrow accounts would therefore not contain sufficient funds to repay fees. Second, employers have no incentive to admit recruitment fees are charged by their agents. H-2 regulations prohibit employers from charging such fees, and current case law allows them to escape liability by denying knowledge later.

226. For a definition of the required wage, see *supra* note 48.

actual coercion. However, the threshold of exploitation is difficult to define with any level of certainty. The myriad factors used to interpret the TVPA demonstrate the malleable and intensely fact-specific nature of this inquiry.<sup>227</sup> Setting the standard at minimum wage would provide clarity and consistency for courts and help employers to anticipate potential liability. Moreover, it reflects the prevailing legislative and social norm that wages below this threshold are not tolerable in our country.<sup>228</sup>

Second, the policy must contain adequate enforcement mechanisms to hold employers responsible when they violate this requirement. It is therefore critical that the policy include a private right of action that permits workers to initiate enforcement and recovery.<sup>229</sup> As noted in Part II, regulatory enforcement efforts have offered little if any protection for exploited guest workers.<sup>230</sup> Aside from budget and staffing constraints, such agencies tend to mire activists in administrative struggles far-removed from actual worker needs.<sup>231</sup> They are also particularly sensitive to the political whims of those appointed to draft, implement, and enforce the regulations.<sup>232</sup>

Even if the appropriate agencies were provided with the funding and impetus to prosecute employers, civil remedies offer a number of additional benefits. First, workers could seek remedies that are tailored to their particular circumstances.<sup>233</sup> Appro-

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227. See *supra* Part III.C.1.

228. In many cases, the federal minimum wage is significantly lower than the wage employers are required to pay under the H-2 program. See *supra* note 48. Therefore, assuming recruitment fees are reasonable, many employers will not have to raise wages or provide separate reimbursement to comply. It is only where wages are extremely low, or recruitment fees unacceptably high, that employers will face additional liability. As previously discussed *infra*, employers may opt to contract with recruiters that do not charge such fees.

229. This right of action must be enforceable in the court system and outside of traditional structures such as the National Labor Relations Board. Past reliance on the NLRB resulted in inevitable delay and backlash by employers against the agencies and politicians that support them. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 51–52 (2005).

230. See *supra* note 64 and accompanying text.

231. Gordon, *supra* note 229, at 55.

232. See *id.* at 43–44.

233. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 2–3 (2005) (describing the benefits associated with amending the TVPA to provide a private right of action).

appropriate compensation might require a mix of injunctive and monetary relief not otherwise available under other types of claims. Workers could also control and direct the legal process, including the type and location of the claim.<sup>234</sup> Finally, prosecution inherently involves some discretion.<sup>235</sup> Providing a private right of action ensures that all victims have the opportunity to obtain relief.

To some extent, these first two requirements may already be present in the FLSA. While its application to recruitment fees has not historically been well-settled, courts do seem to hold employers accountable when they encourage or condone fee collection, and the statute provides a private right of action.<sup>236</sup> However, when recruiters act without employer approval, both exploitative recruiters and the employers who benefit from their services likely do so with impunity under the FLSA.<sup>237</sup> For this reason, this Note advocates holding employers strictly liable for recruitment fees paid by guest workers to the extent that those fees bring the wage below the federal minimum. Strict liability, also known as absolute liability, does not depend on actual negligence or intent to harm; rather, it would provide employers with an absolute duty toward the guest workers they employ.<sup>238</sup> Like travel and visa costs under *Arriaga*, recruitment fees would be treated as de facto deductions that require reimbursement.<sup>239</sup> Critics may argue that it is unfair to hold employers accountable when they

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234. *Id.*

235. *Id.* at 2 (describing limitations of prosecutorial system as applied to trafficking victims).

236. For an overview of FLSA applicability to recruitment fees, see *supra* Part II.C.

237. *Id.*

238. BLACK'S LAW DICTIONARY 934 (8th ed. 2004) ("Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.").

239. A bill proposing vicarious liability on recruitment fees was introduced by California Representative George Miller in 2007 but never passed. See Indentured Servitude Abolition Act of 2007, H.R. 1763, 110th Cong. § 2(a)(4), (b) (2007) ("No fees may be charged to a worker for recruitment," and "[t]he employer shall be subject to the civil remedies of this Act for violations committed by such foreign labor contractor to the same extent as if the employer had committed the violation."). The Act would not, however, provide for a private cause of action to recover damages. Instead it would allow workers to file complaints against employers for which the Secretary may assess a penalty up to \$5,000. H.R. 1763, § 3(b)(1)(A). The Act would have permitted the Secretary to take additional actions, such as seeking specific performance of employment contracts, but would not allow workers to enforce their rights beyond the Secretary's action. H.R. 1763, § 3(c).

are unaware of what recruiters are doing overseas;<sup>240</sup> however, this argument is without merit for a number of reasons.

First, holding employers responsible for recruitment fees serves the policy goals prescribed in the regulatory scheme.<sup>241</sup> For example, the purpose of the guest worker program is to supplement, rather than replace, the domestic workforce.<sup>242</sup> Recruitment fees are a normal cost of doing business for employers recruiting both U.S. and foreign temporary workers. Yet under the current system, employers may easily avoid this cost by employing foreign workers through foreign recruiters whom they ostensibly do not control. Employers need only attest they will forbid recruiters from charging fees, but the regulations provide no recourse if the recruiters fail to comply. Where employers are not paying the recruiters, employers can hardly expect that recruiters are performing their services for free. Even where employers pay some portion of recruitment costs, they may still benefit through lower fees, free access to workers through additional layers of local recruitment, and more sinister benefits arising from an easily exploitable workforce. A strict liability system would close this loophole to better protect American jobs and promote the program's objectives.

Furthermore, the DOL regulations suggest that the department expected employers, not workers, to bear recruitment costs. For this reason, they expressly forbid employers from deducting recruitment fees from employee pay and require employers to forbid their foreign recruiters to charge fees directly.<sup>243</sup> DOL acknowledges and approves the extra burden this may put on employers: "We believe that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country."<sup>244</sup> In explaining its new H-2 regulations, the DOL sug-

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240. Some scholars question the ability of employers to assess whether or not contractors will respect worker rights and to effectively monitor continued compliance. *See, e.g.,* Hill, *supra* note 33.

241. *See supra* notes 55–56 and accompanying text (discussing policy goals defined in regulatory scheme, including preservation of employment opportunities for domestic workers and protection of U.S. wages and working conditions).

242. *See supra* notes 55–56 and accompanying text.

243. *See supra* note 59 and accompanying text.

244. Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,159 (Dec. 18, 2008) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R. pts. 501, 780, 788) (deductions and prohibition on transfer of costs).

gested that employers collaborate in their recruitment efforts to help defray these costs.<sup>245</sup>

Second, employers are in the best position to prevent recruiters from charging exploitative fees. Employer demand drives the market for labor recruitment, and employers have great economic power to control how recruiters operate and at what price. Employers can opt to go through legitimate recruiters and can insist contractually that fees will not exceed a predetermined amount. A strict liability scheme will leverage employers to exercise this power, developing a market for honest recruiters while helping legitimize the larger recruitment system.

In fact, legitimate recruitment options are already available to employers.<sup>246</sup> For example, a handful of Mexican states recently began programs through which employers can contact state governments, which in turn recruit workers.<sup>247</sup> In fact, Mexico has proven successful in facilitating recruitment for Canada's temporary worker program. Under this program, Canadian authorities inform Mexican officials of the number of seasonal workers needed, and Mexican authorities administer the selection process and allocate workers to Canadian employers.<sup>248</sup> The Mexican government has further demonstrated a desire to protect its workers from foreign exploitation, passing legislation that requires upfront payment of travel and recruitments costs by employers.<sup>249</sup>

U.S. labor unions have also organized recruitment options. For example, in 2004, as part of a settlement of the Farm Labor Organizing Committee (FLOC) lawsuit against the North Carolina Growers Association (NCGA), NCGA signed an agreement

245. *Id.*

246. At present, employers almost exclusively go through private agencies to recruit workers. S. POVERTY LAW CTR., *supra* note 3, at 9 ("U.S. employers almost universally rely on private agencies to find and recruit guestworkers in their home countries . . .").

247. While this approach has many supporters, some see few reasons to trust the Mexican government to administer the program. *See, e.g.*, Hill, *supra* note 33.

248. *See* Sanam Yasserli, Note, Out of the Shadows: A Call to End the Exploitation of Non-Agricultural Migrant Workers by Reforming the U.S. H-2B Guest Worker Program, 15 SW. J. INT'L L. 361, 373-80 (2009) (describing the Canadian Seasonal Agricultural Workers Program and suggesting U.S. government also work directly with Mexican government).

249. Ley Federal de Trabajo (Mexico), Art. 28 (requiring foreign employers that hire temporary Mexican workers to pay recruitment, travel, visa, and other costs). Article 28 does not appear to have been tested in Mexico, although some labor activists have included it in complaints in U.S. courts.

whereby workers would apply for agricultural guest worker jobs through the union, bypassing the recruitment process entirely.<sup>250</sup> The agreement was renewed in 2007 and covers around 7,000 workers.<sup>251</sup> Under the FLOC agreement, employers are responsible for all recruitment costs, even where paid at the local level to recruiters not directly affiliated with the employer.<sup>252</sup> Workers arrive at the job site recruitment-debt free — and have an action against employers under the contract if for some reason they do not.<sup>253</sup> Holding employers strictly liable will provide incentives for employers to utilize and develop legitimate routes such as these in lieu of private agents.

## B. PROPOSED METHODS FOR IMPLEMENTATION

The question remains how best to implement these proposed policy changes. There are at least three ways they could be incorporated into the current statutory and regulatory schemes governing the guest worker program. The first approach, and the one this Note most strongly advocates, is to expand the Fair Labor Standards Act, which already includes a private right of action.<sup>254</sup> The FLSA prohibits employers from shifting costs incurred primarily for the benefit of the employer to the worker, to the extent that these deductions bring compensation below the minimum required wage.<sup>255</sup> Where costs such as visa fees and travel costs are paid directly by the worker, courts have inter-

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250. See NCGA's Union Agreement, <http://www.ncgrowers.org/union.php> (last visited Apr. 25, 2010).

251. *Id.*; see also FLOC and NCGA Renew Labor Contract, <http://laborupfront.blogspot.com/2008/03/floc-and-ncga-renew-labor-contract.html> (Mar. 20, 2008, 11:21 EST). Not all employers have been so open to union involvement, and some activists have argued that union involvement can actually undermine otherwise viable workers' rights agreements. For example, in the agreement between Taco Bell parent Yum! Brands and the Coalition of Immokalee Workers, some argued that, had CIW been a union, the deal would never have been reached. There may be industry-wide sentiment that "any crack on the union front is too big to allow." Elly Leary, *Immokalee Workers Take Down Taco Bell*, 57 *Monthly Review* n.5 (October 2005). Leary cites Wal-Mart as an employer that would rather shut down profitable operations than make union concessions. *Id.*

252. See FLOC, LABOR RECRUITMENT, *supra* note 28.

253. *Id.*

254. See 29 U.S.C. §§ 201–219 (2006).

255. See 29 C.F.R. §§ 531.3(d)(1), 531.35 (2009) (prohibiting cost shifting of the cost of goods or services that are "primarily for the benefit or convenience of the employer"); see also *supra* note 66.



preted them as de facto deductions, which require reimbursement.<sup>256</sup> Some courts have also extended the FLSA to recruitment fees where employers encourage or approve their collection.<sup>257</sup>

While courts have declined to extend liability to fees collected without employer knowledge or approval, Congress could relatively easily amend the statute to include strict liability, instructing courts to apply the same de facto deduction rationale for all recruitment costs related to employment under the H-2 program. This approach is similar to that taken under the FLOC contract discussed *supra*.<sup>258</sup> Although a legislative approach may prove politically challenging, Congress has the power, if not the will, to enact it. Alternatively, the Department of Labor has some authority to shape FLSA interpretation and might be able to guide courts to identify indirect recruitment costs as primarily for the benefit of the employer.<sup>259</sup> The current Democratic majority and labor-friendly administration may be more open to such an expansion than past administrations.<sup>260</sup>

Second, the Department of Labor and the Department of Homeland Security could amend the H-2 regulations explicitly to hold employers strictly liable for recruitment fees paid by workers. The H-2 regulations would seem to be a natural home for the new requirements given that they govern other aspects of the program and currently include some restrictions on recruitment fees.<sup>261</sup> Moreover, existing language prohibiting employers from deducting recruitment fees implies that the relevant agencies think employees should not be held responsible for recruitment fees.

Despite its apparent suitability, this approach faces some obstacles. First, it depends on the cooperation of both the Department of Labor and the Department of Homeland Security, agen-

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256. See *supra* notes 66–69 and accompanying text (discussing *Arriaga*).

257. See *supra* notes 72–79 and accompanying text.

258. See *supra* notes 252–53 and accompanying text.

259. Congress delegated the task of administering the FLSA to the Administrator of the Wage and Hour Division of the Department of Labor, who promulgated the “primarily for the benefit of the employer” test. *Rivera v. Brickman Group, Ltd.*, No. 05-1518, 2008 WL 81570, at \*8 n.15 (E.D. Pa. 2008) (citing 29 U.S.C. § 204 (2006)); see also *supra* note 66 and accompanying text.

260. See Steven Greenhouse, In Obama, Labor Finds the Support It Expected, N.Y. TIMES, Mar. 1, 2009, at B3 (Mar. 1, 2009) (discussing support for labor issues in the Obama administration).

261. See *supra* note 59 and accompanying text.

cies that have thus far declined to hold employers liable.<sup>262</sup> As noted above, however, the new administration might have a different approach. Second, this approach would require adding a private right of action for workers, yet DOL and DHS deny they have the authority to provide such a right.<sup>263</sup> If their assertion is correct, the program would continue to rely on what is currently unsatisfactory DOL or DHS administrative enforcement.<sup>264</sup>

The third approach to incorporating the proposed policy change is through the TVPA. Congress could incorporate strict liability for employers into current sections of the TVPA or create a new civil liability section that would specifically apply to guest-worker employers. This approach seems promising given the recent addition of § 1351, which criminalizes fraudulently-induced international recruitment.<sup>265</sup> The new section demonstrates congressional intent to have the TVPA apply to situations less extreme than forced labor. Civil and perhaps criminal liability could simply be extended to apply both to recruiters and employers in the United States who benefit from their actions.

The primary argument against including this protection in the TVPA is the potential need to demonstrate evidence of forced labor, which makes the TVPA appear to apply only to extreme situations. Tying liability to the trafficking statute implies that there needs to be some threshold of coerciveness, whereas this Note argues that employers should be liable regardless of whether or not their actions amount to trafficking. Rather than basing liability on a criminal provision, as in RICO, it makes more sense to make employer payment of recruitment fees a mandatory requirement under the guest worker program.

That said, the strategy of amending the TVPA is promising because the statute is reauthorized periodically, and Congress has been continuously open to expansion. In the 2008 reauthori-

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262. See *supra* Part II.B (discussing lack of DOL and DHS enforcement).

263. See Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110 (Dec. 18, 2008). The DOL claims it “cannot by regulation impose strict liability on employers for labor contractors’ activities abroad.” *Id.* at 77,160. It is unclear if this is a jurisdictional problem due to the foreign nature of the conduct, or the Department’s view that such liability is unwise.

264. See *supra* notes 61–64.

265. See *supra* Part III.C.3.

zation, Congress added a prohibition of the use of child soldiers,<sup>266</sup> which seems further removed from traditional trafficking concerns than protections for migrant workers. Moreover, the recent expansion of the TVPA — and corresponding contraction of labor-law-based protections<sup>267</sup> — indicates that expansion of the TVPA may be more politically palatable than amending the FLSA.

## V. CONCLUSION

The guest worker program in the United States has serious flaws that put workers at risk of exploitation. Program regulations offer inadequate protections, and government enforcement is woefully lacking. Restrictions that bind workers to the employer that obtained their visas keep potential plaintiffs from complaining for fear of deportation — a fear that is all the more intense given the high levels of debt many incur to be recruited for work in the United States. Despite myriad abuses, workers and their advocates have had difficulty recovering recruitment fees under current law. Advocates have experimented with alternative claims under the Racketeer Influenced and Corrupt Organization Act, domestic tort claims, and the Trafficking Victims Protection Act. While each approach has promising components, recovery is far from assured.

Rather than rely on these indirect approaches to recovery, this Note contemplates a solution that will both help avoid the above-mentioned abuses and provide workers with remedies by establishing a clear standard for liability. This Note advocates policy changes that would hold employers strictly liable for recruitment fees to the extent that they bring compensation below the federal minimum wage, and would provide victims with a private right of action. This approach reflects the notion that U.S. employers are in the best position to safeguard worker rights because they select the recruiters with whom and for what price they contract. Part IV.B considered three ways to implement this plan, each of

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266. See Child Soldiers Prevention Act of 2008, Pub. L. 110-457, Title IV, 122 Stat. 5087 (to be codified at 22 U.S.C. § 22370c).

267. See, e.g., Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. at 77,148–49 (rejecting court interpretations of the FLSA to cover transportation and other costs); see also *supra* Part II.C.

which deserves further exploration. The most promising option is through expansion of the Fair Labor Standards Act, an option that is increasingly promising with the advent of a strong Democratic Congress and a new administration.

An un-policed, abusive guest worker program negatively impacts both foreign and domestic workers. It is reprehensible that the program continues in the face of meritorious legal challenges under provisions such as Forced Labor and Trafficking into Peonage. Nevertheless, employers continue to shift exorbitant recruitment costs to workers, exploiting their vulnerability with near impunity. While administrative agencies and Congress have voiced support for victims of guest worker abuse, further steps must be taken to hold employers accountable and to offer workers relief. Holding employers strictly liable for the acts of their recruiters is not a cure all, but it will help to legitimize the recruitment process and alleviate the debt that prevents workers from coming forward.