

Chapter 10

Labor Trafficking

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HUMAN TRAFFICKING
AND THE STATE COURTS COLLABORATIVE

I. Chapter Overview

As concern about human trafficking has grown, attention has been focused more on sex trafficking than labor trafficking although the statistics suggest that labor trafficking is more prevalent. One contributing factor to that disconnect is that labor trafficking is very difficult to identify using current justice system-based approaches, and as a result courts and other justice system organizations often are unaware of the presence of labor trafficking victims in their caseloads. Unlike sex trafficking victims, labor trafficking victims are typically engaged in work that is legal, so they are less likely to come to the attention of the courts as criminal defendants. Further, as the work itself is legal, the existence of trafficking is unlikely to be uncovered unless a victim is willing to come forward to complain and a government official is willing to take action based on the complaint.

The purposes of this chapter are to:

- help judges and court practitioners identify how labor trafficking might appear in criminal, civil, family, juvenile, dependency, probate, municipal ordinance, and other types of cases;
- help judges and court practitioners identify how labor trafficking might appear in other types of forums such as safety, labor, health, licensing, employment and other administrative and regulatory boards and commissions, and how the courts can coordinate with the work of those forums;
- identify possible remedies that labor trafficking victims might have against their traffickers;
- discuss what steps the courts can take to assist and protect participants in court whom the judge has reason to suspect may be labor trafficking victims; and
- identify the types of services that labor trafficking victims might require, including immediate and long-term housing, trauma-informed care, and sustainable jobs, and what the courts can do to assist victims in accessing those services.

The remainder of this chapter contains the following sections:

- a description of the legal rights and protections of labor trafficking victims;
- a review of the characteristics of a labor trafficking-involved case;
- a discussion of judicial strategies for identifying and assisting labor trafficking victims; and
- links to additional tools and resources.

II. Legal Rights and Protections of Labor Trafficking Victims

Definition of Labor Trafficking

The Trafficking Victims Protection Act of 2000 defines labor trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force or fraud or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

Federal and State Laws Providing Rights to Labor Trafficking Victims

There are a variety of federal and state laws that provide rights and remedies for U.S. citizen and immigrant labor trafficking victims. The federal laws include the following:

- **The Trafficking Victims Protection Act of 2000 (TVPA 2000)** – This Act is directly aimed at providing remedies for human trafficking victims. TVPA 2000 provides a definition of trafficking in persons, defines what constitutes a “severe form of trafficking,” makes trafficking in persons a federal crime, provides relief from deportation for immigrants who are victims of a severe form of trafficking through the T visa, and provides that trafficking victims be treated as refugees regarding eligibility for federally-funded services. With regard to labor trafficking, it defines debt bondage as the pledge of personal services as security for a debt where the value of the services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of the services is not limited and defined. The requirements for a T visa are discussed in [Chapter 3](#) of this Guide.
- **Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008)** – The 2008 Act relaxes the T visa requirement of assisting law enforcement in the prosecution of a trafficker for victims facing a present danger of retaliation or suffering physical or psychological trauma, allows United States Citizenship and Immigration Services (USCIS) to consider a possible waiver of disqualification for adjustment of status due to crimes involving moral turpitude committed by a trafficking victim as an incident to the trafficking, requires that holders of visas as diplomatic domestic help workers be provided written contracts as a condition of receiving the visa, and expands the authority of Immigration and Customs Enforcement (ICE) to grant continued presence.
- **Fair Labor Standards Act (FLSA)** – This Act regulates minimum wage, maximum hours, and overtime requirements. Domestic workers who live in the household are excluded from the protections, and other domestic workers are excluded from overtime provisions. It also regulates “oppressive child labor”, which it defines as any employment of a child under 16 years of age by someone other than a parent or guardian, or employment of a child between the ages of 16 and 18 years in an occupation that is determined by the Secretary of Labor to be hazardous or



detrimental to the health and well-being of the child. It gives the employee a right of action for damages for unpaid wages owed due to minimum wage or overtime requirements.

- **Occupational Safety and Health Act (OSHA)** – The OSHA provides for the development and enforcement of occupational health and safety standards by the United States Department of Labor. Individuals who employ people for ordinary household tasks are excluded from the requirements of OSHA. Any rights of employees provided by OSHA are in addition to employee rights under common law or state laws.
- **Title VII 42 U.S.C. 2000e (Title VII)** – This Act prohibits employment discrimination based on race, color, religion, sex, or national origin and sexual harassment in the workplace. It also protects workers who participate in proceedings to enforce rights under the Act. It applies to employers with 15 employees or more.
- **National Labor Relations Act (NLRA)** – This Act provides for the right of workers to organize, bargain, and strike collectively. It excludes domestic workers.
- **New York State Domestic Worker Bill of Rights and California Domestic Worker Bill of Rights** – These Acts provide for overtime benefits for domestic workers who work over a specified number of hours per day or week.
- **California Supply Chain Transparency Act of 2010** – This Act applies to retail sellers and manufacturers doing business in California with annual gross worldwide sales of \$100 million or more. It requires each such business to disclose and post on its internet website the extent to which it has undertaken certain specified efforts to eradicate slavery and human trafficking from its supply chain. Violations are enforceable solely by an action for injunctive relief by the state Attorney General.
- **State laws** – There are common law and statutory rights in all states for employees under contract law, health and safety laws, and personal injury laws that could be available to labor trafficking victims. These laws may provide a victim of human trafficking with a right to bring a civil action for actual, compensatory, and punitive damages and injunctive relief against a trafficker.

Special Legal Issues Regarding Immigrant Labor Trafficking Victims

Immigrant labor trafficking victims face some special problems, including:

- threat of deportation;
- withheld passports, social security, and other documents;
- threats of arrest;
- brought to US under false promises;
- fear of the unknown;
- fear of reprisals against family members, including members remaining in the country or region trafficked from; and,
- numerous culture- and language-based barriers to obtaining help to exit trafficking settings.

Temporary work visas

There are a variety of provisions in federal immigration law that provide an employer with the means to bring temporary immigrant labor into the United States. Two of the most common non-immigrant work visas for temporary or seasonal labor are the H2A and H2B visas.¹ The H2A visa covers temporary or seasonal agricultural workers, and the H2B visa covers temporary non-agricultural workers. Temporary work visas are employer-specific, so the visa holder becomes illegal once he or she stops working for the employer listed on the visa. They are also time limited, either under the law or as specified in the visa, and overstaying the time limit also makes the holder illegally present in the United States. As a result, these visas can provide a trafficker with a means for coercion of a victim by threatening to take action to endanger a victim's immigration status if the victim refuses to comply with the demands of the trafficker.

Refugees or asylees²

Refugees and asylees are non-immigrants who have been granted the right to enter or remain in the United States because of a well founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion if returned to the home country or country of last permanent residence. The right to stay is time limited, although the individual may apply for lawful permanent resident status after a set period of time.

Often refugees from a particular country are settled in communities run by approved sponsoring agencies or organizations under the overall supervision of the Office of Refugee Resettlement of the U.S. Department of Health and Human Services. Individuals in these refugee resettlement communities can be vulnerable to becoming victims of human trafficking, either by people within the community or outsiders.

Refugees may be particularly vulnerable to trafficking due to a combination of low economic status, culture, language difficulties, and the risks inherent in their immigration status. Refugee communities may be especially susceptible to labor trafficking, as federal immigration law can create some ways to facilitate trafficking. Immigration law provides a trafficker the means to bring people through temporary work non-immigrant visas, and most particularly the H2A visa for temporary or seasonal agricultural workers and the H2B visa for temporary non-agricultural workers. Some entire refugee communities come in on these visas. Temporary work visas are employer-specific, so the visa holder becomes illegal once he or she stops working for the employer listed on the visa. This may provide the employer with a means to control the refugee workers.



¹ R 8 U.S.C 1101(a)(15)(H); 8 U.S.C. 1184; 8 CFR §214.2(h)(4)(iii)(A) and (C).

² 8 U.S.C 1101(a)(42), 1157, 1158.

Immigration Consequences of a Criminal Conviction

Any non-citizen, including temporary visa holders, lawful permanent residents, and undocumented immigrants are at risk of being deported for a variety of criminal convictions. A trafficker may force victims to commit crimes that potentially make the victim deportable. The threat of deportation may apply both to lawful and unlawful immigrants. Further, arrest and deportation can occur quickly, before the possibility that the individual is a trafficking victim can be investigated, so the fear of being deported is real even where the immigrant may have a valid defense to deportation. Further, some criminal behavior could also make the trafficking victim ineligible for discretionary immigration benefits requiring a showing of admissibility or good moral character, including adjustment of status and naturalization.

In many cases, ambiguities in immigration law may make the threat of deportation difficult for a victim to determine, so the mere possibility may provide a trafficker with a means to exert continuing control over a non-citizen victim. The immigration consequences of a particular criminal conviction are sometimes difficult to determine, due to:

- ambiguities created by unclear definitions in Federal immigration law of certain crimes that carry immigration consequences;
- the lack of any definitive list of crimes included under each category of crimes that carry immigration consequences under Federal immigration law;
- differences among the Federal Circuit Courts in interpreting which crimes carry immigration consequences under Federal immigration law;
- the constantly changing interpretation of Federal immigration law as case law develops;
- state criminal statutes that include multiple crimes in a single section, some of which carry immigration consequences and some of which do not, so court documents other than the record of conviction may have to be considered to determine the actual elements of the crime for which the individual was convicted;
- the level of discretion that can be exercised by immigration court judges in determining removability of an immigrant and by officers of the United States Citizenship and Immigration Services (USCIS) in determining eligibility for naturalization and other discretionary immigration benefits; and
- the possibility that an alien with a criminal conviction may not necessarily come under scrutiny or be prosecuted by Immigration and Customs Enforcement (ICE).

These difficulties make it difficult for individuals who are experiencing the stress of victimization by a human trafficker to understand and evaluate their immigration rights when threatened by a trafficker. Further, they make it risky for judges, attorneys, and human service providers to think they fully understand the immigration rights of non-citizen trafficking victims merely from their criminal records.

A further risk for undocumented workers is that ICE has conducted raids, sometimes acting on tips from the traffickers themselves, and prosecuted trafficking victims despite being aware of the trafficking claims. This further serves to intimidate trafficking victims and aid traffickers in controlling their victims. In addition, it may result in the deportation of witnesses against the trafficker.

III. Characteristics of the Labor Trafficking-Involved Case

Case Types that may Have Labor Trafficking Issues

A wide variety of criminal, civil, juvenile, and family cases may involve labor trafficking situations. Figure 1 lists how different case types may have trafficking connections.

Figure 1: Types of Cases that may Contain Labor Trafficking Issues

Case Examples	Possible Labor Trafficking Connections
Crimes Against Persons Involving Force, Fraud, or Coercion	<ul style="list-style-type: none"> ■ All of these crimes may be prosecuted as surrogates for a human trafficking charge. ■ A trafficking victim may be coerced into recruiting other victims and thus be subject to a charge of engaging in human trafficking. ■ Gangs may coerce members into criminal activity.
Property Crimes <ul style="list-style-type: none"> ■ Shoplifting ■ Criminal trespass 	<ul style="list-style-type: none"> ■ A trafficker may coerce a victim into stealing in order to provide extra income for the trafficker.
Drug Crimes	<ul style="list-style-type: none"> ■ A trafficker may require victims to engage in drug sales in addition to performing other services. ■ A trafficker may use drugs to control a victim.
Traffic Violations	<ul style="list-style-type: none"> ■ Traffickers may require a victim to drive for work, even if the victim does not have a driver's license.
DUI	<ul style="list-style-type: none"> ■ Traffickers have been known to force their victims to drive, if both have been consuming alcohol, so that the victim gets the ticket if they are stopped.
County or Municipal Ordinance Violations	<ul style="list-style-type: none"> ■ Code violations that involve overcrowded sleeping areas in business locations for employees may indicate labor trafficking or in residential settings may indicate domestic labor trafficking. ■ Unlicensed peddling or other street sales, or door-to-door sales may be conducted as a part of a labor trafficking enterprise
Bail Hearings	<ul style="list-style-type: none"> ■ The person seeking release of a young female may be a much older male.
Probable Cause Hearings	<ul style="list-style-type: none"> ■ A trafficking victim may commit crimes under coercion by a trafficker, particularly drug sales, drug possession, theft, and recruiting other victims. ■ A victim-defendant may engage in criminal activities to escape the trafficker or overcome abuse.
Arrest Warrants	<ul style="list-style-type: none"> ■ Arrest warrants in domestic violence cases may involve a trafficking situation.
Guardianship and Conservatorship	<ul style="list-style-type: none"> ■ Traffickers have been known to seek guardianship over minor victims. ■ Family members may be engaged in trafficking other family members.
Juvenile Dependency	<ul style="list-style-type: none"> ■ If the person seeking to be a guardian or foster parent of a young female is a much older male, the person may be a trafficker. ■ Family members may be engaged in trafficking other family members. ■ The abuse may be a form of control by a parent or guardian.
Divorce and Custody	<ul style="list-style-type: none"> ■ Some parents or extended family members may be trafficking their children or other family members, either for sex or labor.
Civil Cases	<ul style="list-style-type: none"> ■ Wage disputes or suits for debt collection may indicate labor trafficking.

In addition, labor trafficking issues may arise in a variety of types of administrative forums, such as safety, labor, health, licensing, employment and other administrative and regulatory boards and commissions

Health and Safety Claims by Labor Trafficking Victims

In addition to the above, the following health and safety claims related to a workplace may be an indicator of a labor trafficking situation:

- workplace-induced physical injuries, such as mouth and teeth injuries, bruises and broken bones, head wounds, stab and puncture wounds, and malnutrition;
- workplace-induced exposure to infectious and communicable diseases;
- workplace-induced exposure to environmental hazards, such as exposure to chemicals, other irritants and carcinogens contributing to acute and chronic respiratory disease, poisoning, cancer, and skin ailments; and
- workplace-induced mental health problems, including post-traumatic stress disorder, feelings of low self-esteem, anxiety, depression, isolation, shame, self-blame, hopelessness and resignation.



Locales for Labor Trafficking

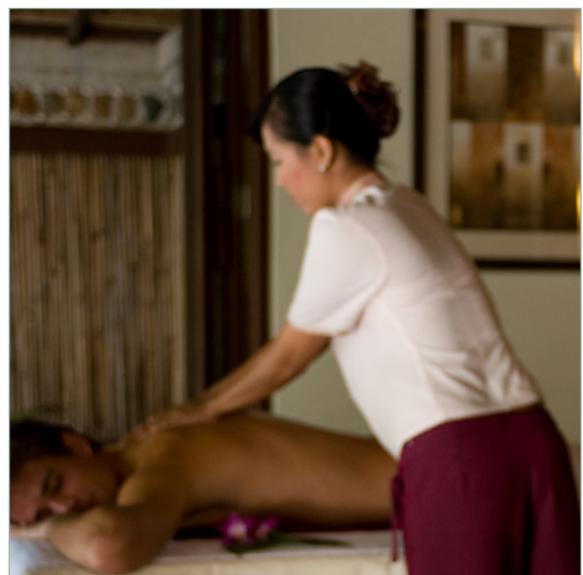
The following are examples of businesses where labor trafficking has been found frequently in the past. Unskilled immigrant labor may be particularly vulnerable to being trafficked.

- **Traveling door-to-door sales crews** – These sales crews typically sell magazines, candy, or other small items, purportedly to raise money for scholarships or to send high school or college students to some camp or special event. They may be bussed from place to place by the trafficker and may not really know where they are. They may be brought *en masse* to a neighborhood, canvas all the houses, and then get driven away together.
- **Domestic labor** – This category of business includes live-in household help such as maids, nannies, cooks, gardeners, and the like. As noted earlier in this chapter, this type of employment is excluded from coverage by most wage and hour regulations.
- **Agricultural labor** – Groups of workers to work in fields picking crops may be brought in as refugees or on temporary work visas and live on the farms in dormitory-like accommodations. The employer may hold their passports. As they live in rural areas, they are typically isolated from local residents and may even have food and other necessities supplied by the employer. This type of employment is typically seasonal in any one location, so workers move from place to place to follow the harvest.

- **Food processing factories** – Some large food processing plants, such as for chickens, hogs, and cattle, located in rural areas may make extensive use of immigrant labor. The employer may hold the passports of the workers. The extent to which the workers are integrated into local communities can vary.
- **Construction and landscaping** – Construction crews and work crews to install sprinkler systems and do other landscaping tasks may make use of immigrant labor and can be a source of trafficked labor.
- **Restaurants** – Restaurants may be a source of family labor trafficking, particularly where undocumented immigrant family members are working for a business owned by family members who are legally present in the United States.
- **Cantinas and bars** – Young women may work in these establishments as hostesses or waitresses whose job is to encourage patrons to buy drinks. They may also serve as dance partners. Sex trafficking may occur in these establishments as well.
- **Nail salons, spas, massage parlors, and escort services** – These are typically licensed by some state or local administrative board, but that does not preclude the possibility that the workers are trafficked labor. Again, sex trafficking may occur in these establishments as well.
- **Peddling or begging rings** – Gangs and other traffickers may force victims to engage in street begging or peddling, some of which may be illegal.

Forms of Coercion for Labor Trafficking

- **Debt bondage.** Workers may be charged exorbitant fees and payroll deductions for room, board, and work-related tools, with payroll deductions for constantly accruing interest. In addition, wages may be withheld to pay interest, with no possibility of reducing the principal owed. Employees typically will not be allowed to have bank accounts.
- **Food withheld** – This may be done as punishment for poor performance on the job or raising complaints to the employer or fellow employees.
- **Verbal and physical abuse** – This also may be done as punishment or to set an example to other employees.
- **Overcrowded living conditions in dormitory settings** – This may come to light as part of an ordinance violation case.
- **Workers kept under surveillance and guard** – The movement of workers may be monitored, with workers not free to come and go as they please.
- **Frequent moving of location** – As a result of constantly being moved, workers do not know what town they are in and make no connections to any community other than with the employer. Workers may be brought to a location in a group from out of state.



- **Isolation** – The employer may prevent employees from communicating with family or friends, refuse to allow employees to learn English, or take other steps to assure that employees are cut off from the outside world.
- **Employer holds passports** – For immigrant workers, the employer may hold their passports and visa documents as a means of control.
- **Retaliation** – The employer may use retaliatory firing or eviction from employer housing to set an example for other employees who complain or challenge the employer. The employer may report employees who are undocumented immigrants or who try to move employers in violation of their work visas to ICE for deportation proceedings.
- **Deceit** – Victims are given false information about the potential consequences of leaving, including that no one cares about them or will be willing to help them, or the potential benefits and rewards of remaining a victim.



IV. Court Strategies for Identifying and Assisting Labor Trafficking Victims

There is a need for alignment between the fundamental values of courts and the needs of human trafficking victims. The role of the courts may be restricted by some fundamental values that they are duty-bound to fulfill, including:

- being independent, fair, ethical, and impartial;
- upholding the rule of law and protecting the integrity of the judicial process;
- being accessible, affordable, timely, and understandable;
- promoting the effective administration of justice; and
- treating all people with appropriate understanding and respect.

The effects of those values on the ability of the courts to help combat human trafficking may be important to defining the roles that other parts of the justice system must play in that effort if the effort is to have any chance of succeeding. These values may be especially important to defining the roles that service providers must play in combating human trafficking in refugee communities, and particularly trafficking of children.

In addition, as discussed in detail in [Chapter 6](#), the ABA Code of Judicial Ethics provides that a judge shall not investigate facts in a case independently and may consider only factual information

that is part of the court record or facts that may be judicially noticed. The prohibition extends to information available through all mediums, including electronic. This prohibition may inhibit a judge's ability to assist a trafficking victim by limiting the judge's ability to conduct an assessment of a possible victim appearing in court as a witness or defendant for evidence of victimization.

In investigating the possibility that trafficking may have occurred, the judge may also end up identifying individuals who should be investigated for engaging in trafficking. This last possibility might apply in cases where a victim may have been coerced by a trafficker into committing a crime but the trafficking activity is not raised as an issue in the case. In those situations, by investigating the possibility that a person may be a victim of trafficking, the judge may be violating the duty to treat the potential trafficker without bias by providing evidence that may later be of use in the prosecution of the trafficker.

Evidence at trial may be problematic in a human trafficking case. Trafficking victims may be reluctant to testify against their traffickers, due on the one hand to fear of reprisal or on the other hand to feelings of attachment to the trafficker and a belief that the trafficker has feelings for the victim. Further, trafficking victims may often suffer from trauma that makes them uncooperative and unsympathetic witnesses. Finally, the victims may face barriers to testifying in court due to language, culture, and immigration status.

Opportunities for Judges and Court Personnel to Investigate Trafficking Issues

Within the above context, there are still strategies available to judges and court practitioners as part of the trial process to take steps to identify the possibility that trafficking issues are embedded in a case before them. Most importantly, judges may be able to use screening tools and analytical methods for uncovering possible labor trafficking issues in the context of decisions requiring analysis of an individual's criminal record, employment status, financial capability, residence, living conditions, and ties to the community. Figure 2 lists proceedings where that type of information might be relevant for judges and court practitioners.



Figure 2: Proceedings Where Trafficking Issues may be Investigated

Proceeding	Possible Trafficking Connections
Issuance of arrest warrant	<ul style="list-style-type: none"> Arrest warrants in domestic violence cases may involve a trafficking situation. Arrest warrants for theft, trespass, illegal peddling, or similar activities may indicate a labor trafficking activity.
Probable cause hearing	<ul style="list-style-type: none"> In determining the existence of probable cause that a crime has been committed by an alleged defendant, a judge may uncover the possibility that the crime was committed under coercion by a trafficker, or committed by a trafficking victim to escape the trafficker or overcome abuse.
Bail and release hearing	<ul style="list-style-type: none"> In deciding whether to release a defendant, a judge can investigate the person’s connections to the community, the stability of living conditions, financial and employment situation, the likelihood that the defendant will flee or be moved from the community, and other factors relevant to the release or hold decision. Any of these may indicate that the defendant is being controlled by a trafficker.
Plea Colloquy	<ul style="list-style-type: none"> The judge may uncover possible trafficking issues in assuring that a plea was knowingly and willingly entered.
Sentencing and determination of mitigating factors and probation conditions	<ul style="list-style-type: none"> With regard to possible victim-defendants, investigating mitigating factors may uncover that the defendant engaged in the criminal activity due to the coercion of a trafficker or the trauma of victimization.
Probation violation hearing	<ul style="list-style-type: none"> Reasons for violating a condition of probation may provide an indication of trafficking.
Removal of child from a home	<ul style="list-style-type: none"> Evidence regarding the conditions in the home may provide an indication of trafficking.
Child custody or placement decision	<ul style="list-style-type: none"> Evidence of the suitability of a parent for custody or the suitability of extended family members for placement of a dependent child may indicate the possibility of family trafficking.
Juvenile diversion decision	<ul style="list-style-type: none"> The decision to place a juvenile into a diversion program may be based on trafficking-involved factors.
Juvenile detention decision	<ul style="list-style-type: none"> The decision whether or not to place a juvenile into detention may be based on trafficking-involved factors, particularly if there is a need to separate the juvenile from a trafficker or evidence that delinquent acts may have been coerced by a trafficker.
Enforcement of settlement as a court order	<ul style="list-style-type: none"> The judge may be able to investigate possible coercion in determining whether to enforce a proposed settlement that looks unusually one-sided.

In any of the above processes, the judge may be able to make use of human trafficking screening tools, or the judge may be able to request that trafficking be investigated by other designated court personnel, the prosecutor; the defense attorney, a probation officer, a pretrial release program; a child protection agency; a juvenile diversion program; a human services agency a GAL, or a CASA volunteer, depending on the type of proceeding.

Indicators of Possible Labor Trafficking

Many trafficking victims suffer serious health issues, including:

- signs of physical abuse, such as bruises, broken bones, burns, and scarring;
- chronic back, visual, or hearing problems from work in agriculture, construction, or manufacturing;
- skin or respiratory problems caused by exposure to agricultural or other chemicals;
- infectious diseases, such as tuberculosis and hepatitis, which are spread in overcrowded, unsanitary environments with limited ventilation;
- untreated chronic illnesses, such as diabetes or cardiovascular disease; or
- reproductive health problems, including sexually-transmitted diseases, urinary tract infections, pelvic pain and injuries from sexual assault, or forced abortions.

If any of the following personal, work, or living conditions regarding a defendant, victim, or witness is evidenced during a trial, that may indicate that the individual is a victim of human trafficking:

- is not allowed to speak to anyone alone;
- is not being paid, is paid very little, or has pay applied directly to reducing debt;
- cannot leave his or her job;
- cannot come and go freely;
- lives in the workplace or with many others in a confined area;
- has to ask permission to eat/sleep/go to the bathroom;
- has locks on doors/windows that he or she cannot unlock; or
- does not have access to identification or travel documents.

What Can the Court Do if Labor Trafficking is Suspected?

If the victims are not parties to a case

Labor trafficking cases are difficult to identify in court, as in many cases the victims have not engaged in any criminal behavior and the trafficker is in court for a matter unrelated to the offense of trafficking, so any evidence that trafficking is occurring may be peripheral to the matter at issue before the judge. Where a possible trafficking situation exists but the victims are not part of the legal proceedings or no victims have been identified, the judge will not have any direct contact with the victims. It is not clear



whether a judge can do anything to assist victims directly in that circumstance, as even raising the possibility that human trafficking is involved may affect the court case and compromise the judge's neutrality.

Judges still may have a role as justice system and community leaders to work with other court practitioners and service organizations in the community to develop a capacity to identify and assist labor trafficking victims, including developing protocols for coordinating the efforts of the courts, law enforcement, prosecution, and administrative boards and agencies that may come across labor trafficking situations as part of their work. One way that this may be accomplished is in the context of a local anti-trafficking task force. [Chapter 6](#) of this Guide discusses the ethical considerations facing judges in participating on such a task force.

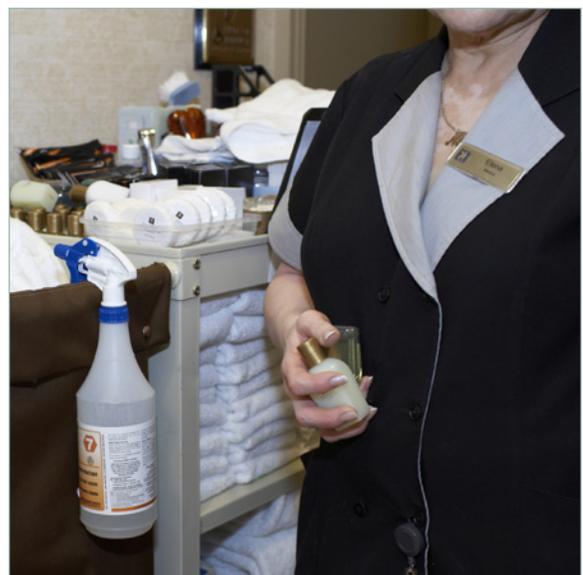
If the victim is in court as a criminal defendant

When a trafficking victim is charged with criminal behavior committed as a result of the victimization, either against the trafficker or coerced by the trafficker, there may be options for a judge to protect the victim or mitigate the consequences of the criminal behavior. Where a crime was committed by a victim due to coercion by a trafficker, coercion by the trafficker may have the following legal consequences for a victim-defendant's criminal liability for his or her acts.

- The coercion may negate the requisite criminal intent, so an essential element of the crime is missing and the offender cannot be convicted.
- Even if all elements of the crime are present under state law so that the offender may be found guilty of the criminal charge, the coercion may justify absolving the offender in whole or in part from the consequences of the behavior.
- The coercion may provide grounds for vacating or expunging the conviction at a later date.

The United States Supreme Court has made it clear in a number of opinions that the burden of proof regarding the consequences of coercion on criminal liability depends on whether the coercion affects the presence of an essential element of the crime as defined by state law.

- The prosecution has the burden of proving beyond a reasonable doubt every element of the crime charged. If the coercion is such that it negates the requisite criminal intent for a crime, once the issue of coercion has been raised, the burden of disproving coercion is placed on the prosecution. This is the case even if state law labels the defense an "affirmative defense." The only burden placed on the defendant is the burden of producing some evidence in order to create a factual issue as to the lack of criminal intent due to coercion. Once this is done, the state then has the burden of proving beyond a reasonable doubt the absence of coercion.



- If the coercion does not rise to the level of negating criminal intent, so that the offender has committed all the elements of the offense but is raising coercion as an affirmative defense in order to avoid the legal consequences of the offense, the burden of proving this defense is on the defendant. The required burden of proof of this affirmative defense may be proof by clear and convincing evidence or by a preponderance of the evidence, depending on state law, but not proof beyond a reasonable doubt.

Prior to conviction, some possible options that may be available to a judge where the commission of the crime may have been influenced by human trafficking victimization include the following:

- refusing to accept a guilty plea where the prosecution's proof may indicate that a crime was committed under coercion due to victimization so that criminal intent or another essential element of the crime is negated;
- continuing the case to allow the defendant to enter proof that a crime was committed as a result of victimization so that criminal intent or another essential element of the crime is negated, if the prosecution's case does not provide proof; and
- continuing a case to allow the defendant to raise an affirmative defense if the victimization doesn't negate an essential element of the crime.

Post conviction, if the victim-defendant is convicted of the crime, the judge may consider victimization as a mitigating factor in determining a sentence.

The judge should be aware that if an immigrant defendant pleads guilty but asks to be absolved in whole or part from the consequences of the behavior, the guilty plea constitutes a conviction under Federal immigration law. The conviction may make the defendant deportable even if the state court judge determines that the defendant should not be punished for the crime due to mitigating circumstances stemming from the effects of being a human trafficking victim.

If the victim is a juvenile in a dependency or delinquency case

A juvenile judge may have the option to treat a delinquency case as a dependency case, if it appears that the delinquent behavior was committed due to coercion by a trafficker or was the result of victimization. Some states have options for certain juveniles charged with prostitution to be classified as sexually exploited juveniles and sent to diversion programs rather than being convicted of prostitution.

A guilty plea by a juvenile trafficking victim charged with a crime coupled with a placement with a family member may give the trafficker more control over the victim. The judge may want to recess or continue a trial if a trafficking situation appears to be present, to determine what steps, if any, need to be taken to protect a possible trafficking victim. There may be a need for a protocol with prosecutors, defense attorneys, and guardians *ad litem* to identify a potential trafficking victim before the victim has to testify in court.

V. Links to Resources

The following are links to the web sites of the six members of the Collaborative: the Center for Public Policy Studies, the Center for Court Innovation, The National Judicial College, Legal Momentum, the National Association of Women Judges, and the National Council for Juvenile and Family Court Judges.

- <http://www.centerforpublicpolicy.org>
- <http://www.courtinnovation.org>
- <http://www.judges.org>
- <http://www.legalmomentum.org>
- <http://www.nawj.org>
- <http://www.ncjfcj.org>

Other Organizations and Resources

The following are links to web sites of other organizations that have programs and resources on justice system responses to issues of human trafficking.

- <http://www.polarisproject.org>
- <http://www.polarisproject.org/human-trafficking/labor-trafficking-in-the-us>

The Polaris Project is a non-profit organization aimed at providing information, technical assistance, training, and services to combat human trafficking and modern day slavery.

- <http://www.ilrc.org>

The Immigrant Legal Resource Center provides research, training and technical assistance on immigration law and policy.

- <http://www.nilc.org/access-to-bens.html>

This web site of the National Immigration Law Center provides more detailed information about immigrant eligibility for benefits.

In addition, the following resources may be of interest.

- Lawyer's Manual on Human Trafficking (Jill Laurie Goodman & Dorchen A. Leidholdt, eds., 2011)
- Polaris Project, *In Their Shoes: Understanding Victims' Mindsets and Common Barriers to Victim Identification* 2-3 (2010), located at <http://tinyurl.com/HT-Resources> (visited Feb. 4, 2014)
- Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941 (Spring 2007)