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Analysis

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Combating Human Trafficking: The Long Arm Of The FAR

Human trafficking—often referred to as a modern-day form of slavery—has for years been among the U.S. Government's "high-priority" enforcement areas. See, e.g., the Department of Justice Web site at *www.usdoj.gov/whatwedo/whatwedo_ctip.html.* The effort is, without a doubt, an important one:

- As many as 800,000 people are trafficked across national borders each year, and approximately 17,500 victims are brought into the U.S. each year, according to DOJ. *Report on Activities to Combat Human Trafficking, Fiscal Years 2001–2005*, Department of Justice, February 2006, at 9.
- According to the International Labour Organization, there are 12.3 million people, including children, in forced labor, bonded labor and sexual servitude at any given time. *Trafficking in Persons Report*, Department of State, June 2007, at 8.
- The Federal Bureau of Investigation estimates that human trafficking generates $9.5 billion in revenue annually. *Trafficking in Persons Report*, Department of State, June 2006, at 13.
- Some project that human trafficking soon will surpass drug trafficking and weapons dealing as the world's largest illegal industry. Jennifer Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 Colum. L. Rev. 1655, 1660 (2007).

Despite these staggering numbers, the number of prosecutions globally has decreased each year from 7,992 prosecutions in 2003 to 5,808 prosecutions in 2006. *Trafficking in Persons Report*, Department of State, June 2007, at 36.

On Aug. 17, 2007, the U.S. Government issued a revised interim rule amending the Federal Acquisition Regulation to implement the Trafficking Victims Protection Reauthorization Act of 2003, as amended by the Trafficking Victims Protection Reauthorization Act of 2005. The revised interim rule prohibits contractors, subcontractors and their employees from engaging in conduct that violates criminal human trafficking statutes and from procuring commercial sex acts, even if such activity is legal, as it is in Nevada. The revised interim rule also requires contractors and subcontractors to notify their employees of the prohibited activities and the disciplinary actions that may be taken against them for violations. The consequences for contractor or subcontractor noncompliance are potentially draconian—termination of the contract for default or cause, suspension, and debarment.

Background—The U.S. long has had criminal statutes prohibiting peonage, involuntary servitude and slavery. See 18 USCA §§ 1581–1588. These laws were expanded and strengthened with the passage of the Trafficking Victims Protection Act of 2000 (TVPA). Not only did the TVPA strengthen existing laws by, for example, extending their reach to cases in which persons are held in a condition of servitude through psychological or physical coercion, it also, inter alia, (1) provided protection and assistance for victims of trafficking; (2) authorized assistance to foreign countries that meet minimum standards for the elimination of trafficking; (3) authorized the withholding of nonhumanitarian, nontrade-related foreign assistance to countries that do not meet those minimum standards; and (4) established the Interagency Task Force to Monitor and Combat Trafficking, chaired by the secretary of state.

Although many TVPA provisions are designed to encourage countries to address this global problem, enforcement efforts originally focused on criminal prosecutions by DOJ and only on violations committed within the U.S. Since the TVPA's passage in 2000, however, the Government has expanded the scope of its enforcement efforts and the reach of its laws.

The Trafficking Victims Protection Reauthorization Act of 2003 amended the TVPA to authorize the termination of any Government contract if a contractor or subcontractor "engages in severe forms of trafficking in persons or has procured a commercial sex act during the period [of performance,] or uses forced labor in the per-

formance of the [agreement]." 22 USCA § 7104(g). The legislative history of the 2003 reauthorization makes clear that Congress was concerned about the "complicity of U.S. Government contractors with trafficking-in-person offenses," as brought to light in an April 2002 congressional hearing. H. Rep. No. 108-264, at 16 (2003), as reprinted in 2003 U.S.C.C.A.N. 2408, 2415. As stated by the House of Representatives Committee on International Relations, "contractors, their employees and agents must be held accountable to a code of conduct with associated consequences for unethical or improper personal conduct while under U.S. Government contracts." Id.

The TVPA's reach expanded again with the passage of the Trafficking Victims Protection Reauthorization Act of 2005, which provides for broad extraterritorial application of TVPA prohibitions. In particular, it expands application of the TVPA to the conduct of contractors, subcontractors and their employees that work abroad. Section 3271 of Title 18 provides that:

> (a) Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under chapter 77 [Peonage, Slavery, and Trafficking in Persons] ... if the conduct had been engaged in within the United States ... shall be punished as provided for that offense.

Persons "employed by the Federal Government" include (a) civilian Government employees, (b) Government contractors and subcontractors, and (c) contractor and subcontractor employees who are not nationals of or ordinary residents in the host country. See 18 USCA § 3272(a).

The Revised FAR Clause—The revised interim FAR rule implementing 22 USCA § 7104(g) sets forth the Government's "zero tolerance policy regarding trafficking in person."

Contractors and contractor employees shall not—

> (1) Engage in severe forms of trafficking in persons during the period of performance of the contract;
>
> (2) Procure commercial sex acts during the period of performance of the contract; or
>
> (3) Use forced labor in the performance of the contract.

FAR 52.222-50(b). This rule applies to all acquisitions, and the FAR clause must be included in all solicitations, contracts and subcontracts.

The revised interim rule also sets forth a contractor's obligations in combating human trafficking. Before we discuss those obligations, however, it is necessary first to understand the scope and breadth of the three prohibitions.

Severe Forms of Trafficking and Forced Labor: Both 22 USCA § 7104(g) and the revised interim rule implementing that provision espouse the Government's zero tolerance policy on severe forms of trafficking in persons and the use of forced labor. We address these together because the prohibition against the use of forced labor is, for practical purposes, subsumed by the broader prohibition against engaging in severe forms of trafficking in persons.

As defined in the TVPA and the revised interim rule, "severe forms of trafficking in persons" include:

> (1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 USCA § 7102; FAR 52.222-50(a).

Cases that have addressed what constitutes a violation of the human trafficking statutes are fact-intensive and do not apply a rigid standard of liability. Rather, courts generally apply a "totality of the circumstances" test to the relevant facts to analyze whether or not laborers were coerced. Among the factors most often considered by courts are (a) the existence of violence or threats of violence; (b) the state of living conditions and other general indicators of treatment of laborers; (c) use of misrepresentations about the nature of the work in order to assemble a workforce; (d) restrictions on laborers' travel; and (e) whether an employee or employer retained possession of laborers' passports, immigration documents or other identification documents.

Violence—Without question, evidence of physical contact and violence is a primary factor that courts consider in determining whether human trafficking has occurred. The violence in many cases is systematic. For example, in *U.S. v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007), the court, in upholding the jury verdict against defendants for sex trafficking and forced labor, focused on the extreme violence committed by the defendant against laborers, as well as the threats of violence against laborers who did not do as they were told. In another case, *U.S. v. Norris*, 188 Fed. Appx. 822 (11th Cir. 2006), a defendant was indicted for sex

trafficking and forced labor violations. The defendant was accused of physically and sexually abusing women, and forcing them to work as prostitutes and perform sex acts.

Similarly, the court in *U.S. v. Lee*, 472 F.3d 638 (9th Cir. 2006), upheld a conviction of human trafficking violations that occurred in American Samoa. In that case, the defendant operated a garment factory in the unincorporated U.S. South Pacific territory. The defendant recruited laborers locally and from Vietnam and China to work at the factory. The court, in upholding the conviction, cited the factory guards' and supervisors' physical abuse of laborers who disobeyed orders. The court noted one particularly violent day when, after a laborer "talked back" to a guard, approximately 20 guards attacked a group of laborers, blinding one.

In all of these cases, courts found that violence or the threat thereof was ever-present and played a substantial role in coercing laborers to continue working for the employer.

Poor Living Conditions and General Mistreatment—Courts tend to consider factors such as poor living conditions, low wages and bad medical care as evidence of abusive employers rather than as dispositive evidence of severe trafficking violations. This seems intuitive because a laborer in a job that provides poor living conditions would feel free to leave that work, assuming no other factors were present. However, courts have cited general mistreatment in conjunction with other factors as further evidence of a scheme or pattern of coercion.

In *U.S. v. Bradley*, 390 F.3d 145 (1st Cir. 2004), the defendant was convicted of forced labor because Jamaican laborers brought to New Hampshire were promised good living conditions, but instead were housed in trailers without running water, electricity or heat, and were denied medical care. Similarly, in *Lee*, the employers deprived their laborers of food, to the point of starvation.

Misrepresentations to Lure Laborers—Courts also have deemed misleading acts by employers to induce laborers to work for them to be relatively strong evidence of forced labor, sex trafficking and coercion. For example, in *Bradley*, the defendants promised high wages and lodging in houses, but paid half of the promised wages and provided poor living conditions. Courts seem to view such trickery as indicative of a willingness to take extreme actions not only to obtain laborers, but to keep them against their will.

Scrutiny of Laborers' Travel—Courts have found evidence of human trafficking violations if an employer scrutinizes or limits laborers' ability to travel. The court found evidence of coercion in *Bradley*, in part because defendants confiscated and held the laborers' passports and restricted local travel.

Courts also have determined that stories of attempted escape by laborers demonstrate that the laborers were not free to leave. For example, in *Norris*, the court described a woman who tried to escape from a bathroom by cutting a hole in a window. Similarly in *Bradley*, the court relied on the escape and "recapture" of one laborer to show that he was not free to leave the location of his employment. These escape attempts are additional evidence of coercion.

In assessing whether individuals have been coerced, judges often try to assess whether they would feel free to leave in light of the particular circumstances. For example, the court in *Bradley* considered the laborers' immigrant status and lack of local ties in determining that the laborers reasonably believed that they could not leave. The court in *Norris* noted special circumstances such as homelessness and drug addiction that may have rendered the women more vulnerable.

Additional Factors—Courts have acknowledged other factors to be evidence of human trafficking as well. These include the doctoring of laborers' documents and the practical inability of laborers to return to their homes. For example, in *Bradley*, the laborers, who earned only $8 per hour and had to pay $50 per week for rent, could not afford the $1,000 return ticket to Jamaica.

Commercial Sex Acts: Although in some sense the FAR prohibition against activities that likely would also violate the TVPA is not remarkable, the same cannot be said for the FAR prohibition against the procurement of a commercial sex act, which is broadly defined to mean any sex act on account of which anything of value is given to or received by any person.

In issuing the revised interim rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council acknowledged that the rule covered conduct that might otherwise be lawful, but noted their belief that "Congress' intent [in 22 USCA § 7104(g)] is to reduce the demand for commercial sex acts, both lawful and unlawful, as such activities have contributed to the worldwide problem of trafficking in persons." 72 Fed. Reg. 46337 (Aug. 17, 2007).

Contractor Requirements and Government Remedies: The breadth of the U.S. zero tolerance policy creates myriad compliance and enforcement difficulties for contractors. One issue about which the FAR is not clear is whether it now penalizes contractors for their employees'

personal conduct. FAR 52.222-50(c) sets forth contractors' affirmative obligations to further the zero tolerance policy and the remedies available to the Government if contractors do not fulfill those obligations. Specifically, it requires, inter alia, that every contractor:

- notify its employees of the Government's zero tolerance policy;
- notify its employees of the actions that will be taken against anyone violating the policy, including a reduction in benefits, removal from contracts or termination of employment; and
- notify the contracting officer of (a) any information from any source that alleges that employees or subcontractor employees have engaged in conduct that violates the policy, and (b) actions it has taken against those employees.

Potential remedies for a contractor's violation of the notice, discipline and reporting requirements include removal of the offending employee from performance of the contract, suspension of contract payments, loss of award fee, termination of the contract, and even suspension or debarment. FAR 52.222-50(e).

FAR 22.1704, however, seems to suggest that the Government can impose these remedies *even if the contractor complies with the notification, discipline and reporting requirements*. As a practical matter, termination of a contract in such circumstances may never be imposed, but the broad sweep of FAR 22.1704 undoubtedly will concern contractors.

Precisely what is and is not prohibited by the zero tolerance policy also is unclear. For example, although "commercial sex act" is defined as "any sex act on account of which anything is given to or received by any person," there is no definition for the term "sex act." Such lack of detail makes enforcement of the zero tolerance policy difficult, if not impossible.

It is worth noting that the U.S. Department of Defense has issued an interim Defense FAR Supplement rule that requires certain contractors to "conduct periodic reviews of ... service and construction subcontractors to verify compliance with their obligations" under the zero tolerance policy. DFARS 252.222-7006(g)(2). How and with what frequency such reviews are to be conducted, and whether contractors are qualified and equipped to conduct such reviews, are open questions.

Notwithstanding the uncertainties about the extent of a contractor's obligations under the revised interim rule, it would be wise for contractors to, at a minimum, establish and disseminate to their employees written policies and procedures that explain the Government's zero tolerance policy and the consequences for violating that policy. To ensure effective communication of that policy, a contractor's written guidance should include examples of what constitutes and indicia of human trafficking.

Contractors should carefully consider other prescriptions, such as whether to *require* employees to report on a coworker's violation of the policy, before implementing them. In light of the revised interim rule's mandate that contractors notify a CO of *any* information from *any* source that alleges a violation of the Government policy, some contractors may be wary of establishing such a requirement for its employees.

Conclusion—The revised interim rule imposes far-reaching and potentially onerous obligations on Government contractors. To avoid the remedies for noncompliance—including termination, suspension and debarment—contractors must, at a minimum, establish policies and procedures that effectively notify employees of the zero tolerance policy and the consequences for violating that policy. Contractors also must follow through with disciplining employees who violate the policy and notify a CO of any alleged violation. Although what constitutes compliance with the rule is ambiguous, contractors that make no attempt to comply do so at their own peril.

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