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Misrepresentations in Labor Trafficking: State Laws as an Alternative Theory of Liability for Recruiters

Hannah Garvin

Georgia State University College of Law, hgarvin1@student.gsu.edu

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**MISREPRESENTATIONS IN LABOR
TRAFFICKING: STATE LAW AS AN
ALTERNATIVE THEORY OF LIABILITY FOR
RECRUITERS**

Hannah Garvin*

ABSTRACT

When addressing labor trafficking of migrants, the focus is typically on prosecuting the traffickers directly involved in obtaining a victim's labor, but traffickers cannot exploit labor without victims. Research has shown that recruiters, both those intending to provide labor traffickers with victims and those who have no knowledge of the subsequent exploitation perpetrated by the supposed employer, often misrepresent job opportunities to migrants. Both types of recruiters profit off of the exploitation of migrants and ultimately continue to propagate labor trafficking. To effectively deter trafficker-recruiters and ensure independent recruiters are acting ethically, an all-encompassing method of accountability needs to be established.

Federal anti-trafficking and state employment agency law appear to address misrepresentations made during recruitment, but each comes with issues that limit their applicability. This Note therefore proposes a model statute that pulls the best parts of federal and state law to effectively address both trafficker-recruiters and independent

* Associate Research Editor, *Georgia State University Law Review*; J.D. Candidate, 2024, Georgia State University College of Law. I am extremely grateful to the many people who supported me throughout this process. To Professor Todres, thank you for your insightful feedback on each draft. To my colleagues at the *Georgia State University Law Review*, thank you for your dedication to editing this Note. Lastly, but most importantly, thank you to my family and friends for your unwavering support during my law school career.

recruiters. Regardless of any realistic application, the model statute's language highlights the benefits and drawbacks of using federal versus state law to hold recruiters accountable.

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INTRODUCTION

Sveta lived in a small, impoverished town in Chernivtsi Oblast, Ukraine, before she was approached by men promising good work and better living conditions in the United States if she would work for their cleaning service.¹ The men claimed they would pay her \$500 per month (roughly ten times her then-current earnings), transport her to the U.S., and provide her identity documents for entry into the country as well as food and housing.² Sveta soon discovered, however, that the men's claims had been nothing more than false promises as a means for exploiting her for their own gain.³ The men obtained a visa for Mexico instead of the U.S., forcing her to enter the U.S. illegally.⁴ Sveta shared a bedroom with six strangers, and any food provided to her was spoiled.⁵ Every day—including holidays—she “worked long overnight shifts, cleaning offices and stores.”⁶ Sveta was never paid.⁷

Sadly, this experience is not unusual for migrant workers around the world: recruiters often make false promises about visas, wages, and working and living conditions.⁸ Such misrepresentations may lead, as they did in Sveta's case, to labor trafficking.⁹ The international

1. United States v. Botsvyniuk, Crim. No. 10-159-1, 2012 WL 2885928, at *1–2 (E.D. Pa. July 16, 2012), *aff'd*, 552 F. App'x 178 (3d Cir. 2014). Sveta is a pseudonym; none of the survivors in the case were identified for anonymity purposes. *Id.*; see also *Terminology*, HUM. TRAFFICKING COLLABORATIVE, UNIV. OF MICH., <https://humantrafficking.umich.edu/about-human-trafficking/terminology/> [<https://perma.cc/CBH4-WRPZ>] (referring to a survivor as “[a]n individual who has survived an experience of human trafficking”).

2. *Botsvyniuk*, 2012 WL 2885928, at *1.

3. *Id.* at *1–2.

4. *Id.*

5. *Id.* at *2.

6. *Id.*

7. *Id.*

8. *E.g.*, David v. Signal Int'l, LLC, 37 F. Supp. 3d 822, 825 (E.D. La. 2014); Amended Superseding Indictment at 5, United States v. Rahman, No. 17-cr-00001 (D. N. Mar. I. Aug. 3, 2017) [hereinafter *Rahman Indictment*].

9. E. Christopher Johnson Jr., Fernanda Beraldi, Edwin Broecker, Emily Brown & Susan Maslow, *The Business Case for Lawyers to Advocate for Corporate Supply Chains Free of Labor Trafficking and Child Labor*, 68 AM. U. L. REV. 1555, 1567 (2019) (“The recruitment process facilitates labor trafficking when corrupt labor brokers, recruiters, employment agencies, or other intermediaries prey on vulnerable

community, in particular nongovernmental organizations (NGOs) and international organizations, is pushing for fair recruitment standards for migrant workers and for accountability for those recruiters engaged in unfair practices.¹⁰ The U.S. seemingly recognized this need, at least in part, by criminalizing labor trafficking recruitment, knowingly benefitting from forced labor, and fraud in foreign labor contracting.¹¹ Enforcement of these recruitment-based crimes, however, has been extremely limited and tends to primarily address situations where the recruiter was also the employer.¹² As a result, stand-alone

workers and engage in ruthless practices such as . . . deceiving workers about the actual terms of the job.”); U.N. OFF. ON DRUGS & CRIME, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS 15–16 (2015) [hereinafter UNODC RECRUITMENT REPORT], https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf [<https://perma.cc/6LDX-HUPV>] (discussing the operational indicators of trafficking in persons, which include “deception about the nature of the job, location, employer, conditions of work, the legality of work contracts, housing and living conditions, legal documentation or obtaining legal migration status, travel and recruitment conditions, wages and earnings, and educational opportunities”).

10. U.S. DEP’T OF STATE, USAID & U.S. DEP’T OF LAB., GUIDANCE ON FAIR RECRUITMENT PRACTICES FOR TEMPORARY MIGRANT WORKERS 1 (2022), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf> [<https://perma.cc/7WT4-6WKP>]; INT’L LAB. ORG., GENERAL PRINCIPLES AND OPERATIONAL GUIDELINES FOR FAIR RECRUITMENT AND DEFINITION OF RECRUITMENT FEES AND RELATED COSTS 31 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf [<https://perma.cc/YCT2-LN4V>]; VERITÉ, FINANCIAL AND CONTRACTUAL APPROACHES TO MITIGATING FOREIGN MIGRANT WORKER RECRUITMENT-RELATED RISKS 19 (2019), <https://verite.org/wp-content/uploads/2019/10/Verite-Financial-and-Contractual-Approaches-to-Mitigating-Foreign-Migrant-Worker-Recruitment-Related-Risks.pdf> [<https://perma.cc/9YLG-4Q5K>]; UNODC RECRUITMENT REPORT, *supra* note 9, at 16; KATHARINE JONES, INT’L ORG. FOR MIGRATION, RECRUITMENT MONITORING & MIGRANT WELFARE ASSISTANCE: WHAT WORKS? 10–13 (2015), <https://publications.iom.int/books/recruitment-monitoring-migrant-welfare-assistance-what-works> [<https://perma.cc/ET5F-KY3S>]; THE INT’L LAB. RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 5–6 (2013), <https://respect.international/wp-content/uploads/2013/02/The-American-Dream-Up-for-Sale-A-Blueprint-for-Ending-International-Labor-Recruitment-Abuse.pdf> [<https://perma.cc/SH33-MTCA>].

11. Victims of Trafficking and Violence Protection Act (Trafficking Victims Protection Act or TVPA) of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1487 (2000) (codified at 18 U.S.C. § 1590); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5068, 5071 (2008) (codified at 18 U.S.C. §§ 1351, 1589(b)).

12. Between 2008 and 2022, there were eleven convictions under 18 U.S.C. § 1351, seventy-three under 18 U.S.C. § 1589, and thirty-four under 18 U.S.C. § 1590. *Federal Criminal Case Processing Statistics*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT.,

trafficker-recruiters who intentionally obtain migrants for later exploitation by a separate trafficker-employer largely escape liability.¹³ Furthermore, trafficker-employers often hire independent recruiters; these recruiters are also engaged in and have an impact on the trafficking supply chain.¹⁴ Yet, because the independent recruiter is simply conducting routine business and is deemed not to have the requisite intent, they also escape liability under the federal statutes.¹⁵

This Note addresses the gap in prosecuting stand-alone recruiters who make false promises, either intentionally or unintentionally, to

<https://www.bjs.gov/fjsrc/tsec.cfm> [<https://perma.cc/845K-VQ3K>] (choose “United States Code Statistics”; then choose the statistic “Outcomes for persons in cases closed”; then choose “Chapter and section within U.S.C. Title 18”; then choose either “63--Mail fraud” or “77--Peonage and slavery” code group; then choose the year) (including data for any type of violation of 18 U.S.C. §§ 1589 and 1590—even those beyond the recruitment-based offenses discussed in this Note—but excluding data for convictions related to conspiracy). A limited number of recruiters, who were not also the employer, have been prosecuted under 18 U.S.C. § 1351. Rahman Indictment, *supra* note 8, at 2, 5 (indicting Rahman, Islam, and Dalu, who were not employers, for recruiting workers for Phan); Superseding Indictment at 5, United States v. Cabrera, No. 0:15-cr-00190-DSD-LIB (D. Minn. Nov. 18, 2015) [hereinafter Cabrera Indictment] (indicting Cabrera for recruiting workers from his hometown for Svihel Farms). *But see Criminal Section Selected Case Summaries*, U.S. DEP’T OF JUST., C.R. DIV., <https://www.justice.gov/crt/criminal-section-selected-case-summaries#humantrafficking> [<https://perma.cc/L68W-M4UT>] (Jan. 6, 2022) (listing major Department of Justice human trafficking cases, almost all of which involve a recruiter-employer).

13. See Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 407 (2010); see *infra* note 29 and accompanying text. This Note refers to “stand-alone recruiter” as a recruiter who is not also the employer and therefore not engaged in other elements of the crime.

14. Kristen Bracy, Bandak Lul & Dominique Roe-Sepowitz, *A Four-Year Analysis of Labor Trafficking Cases in the United States: Exploring Characteristics and Labor Trafficking Patterns*, 7 J. HUM. TRAFFICKING 35, 38, 41 (2021) (reporting that independent staffing agencies accounted for the recruitment of thirty-five percent of labor trafficking victims involved in cases over a four-year period); POLARIS, RECRUITMENT, HUMAN TRAFFICKING, AND TEMPORARY WORK VISAS 1 (2021), <https://polarisproject.org/wp-content/uploads/2021/09/Recruitment-Human-Trafficking-and-Temporary-Visa-Workers.pdf> [<https://perma.cc/3UJ6-EUFQ>] (acknowledging that an employer hiring recruiters occurs more commonly in the migrant context). An independent recruiter’s likely lack of awareness of the underlying trafficking scheme is just as dangerous as an intent to defraud or knowledge of the forced labor scheme; the migrants still end up in the same exploitative situation due to the recruiter’s actions. See *infra* note 29 and accompanying text. Additionally, the U.N. found:

Sometimes recruiters and recruitment agencies may not be aware of the exploitative situations that the victims will eventually find themselves in, but may still engage in practices that make people particularly vulnerable to ending up in exploitative work. While such practices may fall outside the definition of trafficking in persons, they may still contribute to the vulnerability of people and a climate in which trafficking in persons can flourish.

UNODC RECRUITMENT REPORT, *supra* note 9, at 15.

15. See *infra* note 130 and Part III.

migrants seeking work within the U.S.¹⁶ Part I explores the landscape of labor trafficking and recruitment, the under-prosecution of labor trafficking in the U.S., and state laws related to misrepresentations in recruitment.¹⁷ Part II analyzes the various federal labor trafficking recruitment-related and state employment agency-related laws that prohibit misrepresentations in the recruitment process.¹⁸ Part III proposes that, on their own, these federal and state laws are insufficient to prosecute both trafficker-recruiters and independent recruiters and establishes a model statute that draws on the benefits of federal and state law to prosecute all stand-alone recruiters.¹⁹

I. BACKGROUND

A. *International Obligations in Addressing Fraud and Deceit in Labor Recruitment*

As the international community began to recognize nontraditional forms of slavery in the early twentieth century, a number of conventions were created to condemn exploitative practices like prostitution, debt bondage, and forced labor.²⁰ Despite some recognition of the broad scope of possible exploitation, the primary focus centered on the sex trafficking of women and children, as

16. Although varying definitions exist for migrant, this Note adopts the broad definition used by the Department of Homeland Security to ensure the Note accounts for anyone seeking employment within the U.S. *Reporting Terminology and Definitions*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/reporting-terminology-definitions#12> [<https://perma.cc/J3EL-U4EE>] (defining migrant as a “person who leaves [their] country of origin to seek temporary or permanent residence in another country”); see *Migrants, Asylum Seekers, Refugees and Immigrants: What's the Difference?*, INT'L RESCUE COMM., <https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference> [<https://perma.cc/8B98-U7W8>] (July 13, 2022) (“There’s been confusion and debate over the use of [refugee, asylum seeker, migrant, and immigrant] to describe the plight of those on the move.”).

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

20. *International Instruments Concerning Trafficking in Persons*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Aug. 2014), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/OnePagers/IntInstrumentsconcerningTraffickingpersons_Aug2014.pdf [<https://perma.cc/8WQW-XSE3>].

reflected by the progression of international policy.²¹ The broad scope of trafficking was not officially recognized until 2000 with the ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).²² Instead of merely referencing unfavorable exploitative practices, the Palermo Protocol mandated criminalization of trafficking.²³ The Palermo Protocol defined “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, *forced labour or services, slavery or practices similar to slavery, servitude* or the removal of organs[.]²⁴

21. Dana Raigrodski, *Economic Migration Gone Wrong: Trafficking in Persons Through the Lens of Gender, Labor, and Globalization*, 25 IND. INT'L & COMPAR. L. REV. 79, 87–88, 97 (2015).

22. See G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3 (Nov. 15, 2000) [hereinafter Palermo Protocol]. Other conventions addressed either sex trafficking alone or a broad range of exploitative practices but only for certain vulnerable groups. Raigrodski, *supra* note 21, at 88–90. Even the Palermo Protocol initially intended to deal exclusively with trafficking of women and children. *Id.* at 97.

23. Palermo Protocol, *supra* note 22, art. 5.

24. *Id.* art. 3 (emphasis added). Using the “Acts-Means-Purpose Model” helps understand trafficking in persons: the crime has occurred when “a trafficker[] takes any one of the enumerated [a]ctions[] and then employs the [m]eans . . . for the [p]urpose of compelling the victim to provide commercial sex acts or labor or services.” *Understanding the Definition of Human Trafficking: The Action-Means-Purpose Model*, POLARIS, NAT'L HUM. TRAFFICKING HOTLINE (2012), <https://humantraffickinghotline.org/sites/default/files/AMP%20Model.pdf>. [<https://perma.cc/29BT-TXHN>].

Labor trafficking was finally criminalized in full.²⁵

Since then, the international community has undertaken extensive research to understand the mechanisms by which labor trafficking occurs.²⁶ Of particular interest and importance are the methods by which workers, specifically migrant workers, are recruited or brought into spaces of exploitation.²⁷ Stand-alone recruiters, who act as

25. See Palermo Protocol, *supra* note 22, art. 3, 5. In 1930, the International Labour Organization (ILO) enacted the Forced Labour Convention, which mandated ratifying members to “undertake[] to suppress the use of forced or compulsory labour in all its forms,” defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” *Co29 - Forced Labour Convention, 1930 (No. 29)*, INT’L LAB. ORG., https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C029,/Document [<https://perma.cc/N9Y2-8LAR>]. Although forced labor and labor trafficking are distinct, the two are frequently conflated and sometimes other relevant terms (like involuntary servitude) are also confused. Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 619–20 (2014) (discussing how both the Bush and Obama Administrations rejected the distinction between trafficking in persons and forced labor, as defined and interpreted by the ILO). Compare Palermo Protocol, *supra* note 22 (citing forced labor as a purpose for labor trafficking), with *What Is Modern Slavery?*, U.S. DEP’T OF STATE, OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., <https://www.state.gov/what-is-modern-slavery/> [<https://perma.cc/38Q5-CFYC>] (stating labor trafficking as an alternative term for forced labor), and LINDSEY LANE, ANGELA GRAY & ALICEN RODOLPH, HUM. TRAFFICKING INST., 2021 FEDERAL HUMAN TRAFFICKING REPORT 8 (2022), <https://traffickinginstitute.org/wp-content/uploads/2022/06/2021-Federal-Human-Trafficking-Report-Web.pdf> [<https://perma.cc/Z86N-Y54U>] (comparing sex trafficking with forced labor instead of labor trafficking), and AMY D. LAUGER & MATTHEW R. DUROSE, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., HUMAN TRAFFICKING DATA COLLECTION ACTIVITIES, 2021 2 (2021), <https://bjs.ojp.gov/content/pub/pdf/htdca21.pdf> [<https://perma.cc/W59X-4ZVE>] (referring to the U.S. definition of labor trafficking as involuntary servitude).

26. See, e.g., *Publications on Forced Labour*, INT’L LAB. ORG., <https://www.ilo.org/global/topics/forced-labour/publications/lang=en/nextRow=0/index.htm?facetcriteria=TAX=A.65> [<https://perma.cc/HYU5-AUFN>] (choose “trafficking in persons” from the “Browse by” menu on the right) (listing studies conducted to evaluate the intricacies of trafficking in persons in relation to forced labor).

27. E.g., U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020 14 (2020) [hereinafter 2020 GLOBAL TIP REPORT], https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf [<https://perma.cc/87VY-ER6G>] (“The more common pattern followed by traffickers, however, is to employ deceptive or manipulative means—at least during the recruitment phase.”); Bassina Farbenblum & Justine Nolan, *The Business of Migrant Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?*, 52 TEX. INT’L L.J. 1, 4 (2017) (“Systemic ‘abuses and fraudulent practices’ within the recruitment industry have been documented by a number of scholars in recent years.”). Migrants are subject to “extreme vulnerability” due to their “circumstances [pushing them] to take inordinate risks in trying to pursue what they believe to be better opportunities elsewhere to sustain themselves and their families.” Raigrodski, *supra* note 21, at 107; accord Becky Giovagnoni & Mary Nikkel, *Forced Labor in the United States*, THE EXODUS RD. (July 15,

intermediaries between the migrant worker and trafficker-employer and may be involved in the trafficking scheme themselves, often misrepresent at least some aspect of the job they are offering to the vulnerable migrants.²⁸ Once those migrants realize the job is not what they expected, they are already subject to the employer and other coercive, threatening, or forceful measures.²⁹ Heightened advocacy for migrant workers and a general push for increased transparency in all aspects of labor recruitment has accompanied this increased understanding of unethical and unfair recruitment practices.³⁰

2021), <https://theexodusroad.com/forced-labor-in-the-united-states/> [https://perma.cc/83JE-HX5X] (discussing how migrants “are vulnerable because they do not speak English or understand the laws or their own rights”); Farbenblum & Nolan, *supra*, at 7 (“At the core of the problem lies a set of powerful structural forces that combine to make migrant workers especially vulnerable to deceptive and extortionate conduct by recruiters. These forces include[] [a] combination of poverty and unemployment at home and the promise of higher wages in countries of employment . . .”).

28. Mariana C. Minaya, *American Dreams, Trafficking Nightmares*, 2 TENN. J. RACE GENDER & SOC. JUST. 64, 83 (2013) (recognizing that recruiters “lie to workers about their immigration status, recruit for non-existent jobs, [and] misrepresent the job and work conditions” and usually operate in conjunction with employers and other actors); UNODC RECRUITMENT REPORT, *supra* note 9, at 15 (“Recruitment agencies also could be part of complex organized criminal groups involved in human trafficking, knowing that the victims were going to be exploited.”).

29. Carr, *supra* note 13 (“While recruiters are responsible for the initial misdeeds, many employers exploit the ensuing worker vulnerabilities.”). Migrant worker vulnerability (due to language barriers, dependence on employers for legal status, and fear of deportation) creates a perfect scenario for employers to exploit these workers—no matter who recruited them. *Id.* at 408–10; *see supra* note 27 and accompanying text. A trafficker-employer will underpay the migrant workers, often below the minimum wage, and subject the migrant to poor working conditions. Carr, *supra* note 13, at 409–10. The trafficker-employer may also proceed to confiscate migrants’ passports and immigration documents and to restrict their movement or access to communication. *Id.* at 407–08. In instances of a stand-alone trafficker-recruiter, the trafficker-recruiter may work alongside the trafficker-employer to hold a migrant workers’ debt, incurred through paying high recruitment fees, against the migrant. *Id.* at 406. Trafficker-employers may also use misrepresentations made during recruitment to their advantage to exploit migrant workers. *Id.* at 406–07. In some cases, the trafficker-employer tells the migrant worker that the worker will receive a certain type of employment and U.S. visa status, but the visa they actually receive prevents them from obtaining alternative or additional work. *Id.* at 407.

30. *See* sources cited *supra* note 10.

B. The United States Addresses Labor Trafficking and Related Crimes

Migrant labor recruitment issues in the U.S. mimic those seen in the global sphere.³¹ Some stand-alone recruiters misrepresent the job offered, the living arrangements to be provided, and relevant visa pathways available.³² As a result, migrant workers end up in exploitative conditions upon entering the U.S.³³ Although estimating the prevalence of labor trafficking is difficult, most survivors identified are migrants, and misrepresentations comprise the primary means of inducing the migrants to take jobs in the U.S.³⁴ Understanding existing U.S. law is critical to evaluate potential steps to address these exploitative recruitment practices and obtain justice for survivors subject to such fraud and abuse.³⁵

31. Compare 2020 GLOBAL TIP REPORT, *supra* note 27 (acknowledging the prevalence of false promises and deception in migrant worker recruitment globally), with Minaya, *supra* note 28, at 64 (discussing how unethical recruitment practices could lead to labor trafficking in the U.S.), and Carr, *supra* note 13, at 399–400 (evaluating private actions available in the U.S. to migrant workers when “recruiters . . . falsely promise high wages, quality work, and legal immigration status”).

32. Bracy et al., *supra* note 14, at 43; Minaya, *supra* note 28, at 64.

33. See *supra* note 29 and accompanying text.

34. Leila Miller, *Why Labor Trafficking Is So Hard to Track*, PBS (Apr. 24, 2018), <https://www.pbs.org/wgbh/frontline/article/why-labor-trafficking-is-so-hard-to-track/> [<https://perma.cc/M2UV-EMJV>] (“[T]here are no reliable estimates on the number of victims of labor . . . trafficking . . .”); Bracy et al., *supra* note 14, at 42–43 (finding that, from U.S. data collected from 2013 to 2016, seventy-six percent of labor trafficking victims qualified as migrants, and recruiters used bait and switch tactics or false promises of wealth and rewards); LANE ET AL., *supra* note 25, at 31, 52 (reporting that ninety-three percent (fifty-two) of survivors in new forced labor cases identified in 2021 had non-U.S. foreign national status, all of whom were recruited by, at the least, a fraudulent job offer, if not also the promise of a visa, essential resources, or shelter); LANE ET AL., *supra* note 25, at 8 (acknowledging that the report does not reflect the prevalence of forced labor in the U.S.); see also LINDSEY LANE, ANGELA GRAY, ALICEN RODOLPH & BRITTANY FERRIGNO, HUM. TRAFFICKING INST., 2022 FEDERAL HUMAN TRAFFICKING REPORT 50 (2023), https://traffickinginstitute.org/wp-content/uploads/2023/06/2022-Federal-Human-Trafficking-Report-WEB-Spreads_compressed.pdf [<https://perma.cc/X84L-9REF>] (reporting that only thirty-eight percent (six) of survivors in new forced labor cases identified in 2022 were foreign nationals).

35. Addressing exploitative practices is also encouraged by the United Nations pursuant to U.S. obligations under the Palermo Protocol. G.A. Res. 10/3 art. 11 (2020). In particular, the United Nations [*e*]ncourages States to strengthen national laws or take other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, aimed in particular at such new recruitment and advertising methods, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, and that leads to trafficking[.]

Id.

1. *The TVPA and the TVPRA*

In 2000, the same year that the international community adopted the Palermo Protocol, the U.S. enacted the Trafficking Victims Protection Act (TVPA).³⁶ The TVPA defined labor trafficking as “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.”³⁷ Inclusion of 18 U.S.C. § 1590 criminalized “knowingly” performing any of these acts for the purpose of obtaining and exploiting one’s labor.³⁸ With passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Congress expanded the TVPA to include a number of additional trafficking-related crimes.³⁹ The TVPRA allowed for the prosecution of “[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has

36. *See generally* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The U.S. did not actually accede to the Palermo Protocol until 2005. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf> [<https://perma.cc/8GZH-DM8H>].

37. Trafficking Victims Protection Act § 103(8)(B). Fraud was included in the list of means required to demonstrate labor trafficking because, although physical violence (force), threats, and coercion are “often” used to actually compel labor, Congress understood, even at the time, that “[t]raffickers lure [people] into their networks through false promises of decent working conditions at relatively good pay.” *Id.* § 102(b)(2), (4), (6) (referring to women and girls, substituted here, which reflects the misunderstanding that most victims are women and children). Additionally, the list of exploitative practices encompassed peonage, involuntary servitude, slavery, debt bondage, and forced labor. *Id.* § 103(8)(B); *see id.* § 112 (codified at 18 U.S.C. § 1590). The Act, however, only defined—not criminalized—debt bondage. *Id.* § 103(4).

38. *Id.* § 112 (codified at § 1590). Courts also allow prosecution of commercial sexual exploitation under this statute. *E.g.*, *United States v. Buck*, 661 F.3d 364, 367 (8th Cir. 2011) (affirming a motion to deny a plea withdrawal where the defendant in a commercial sex trafficking operation pled guilty to violating § 1590).

39. *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 222, 122 Stat. 5044, 5067–71 (2008) (codified as amended in scattered sections of 18 U.S.C.) (criminalizing fraud in foreign labor contracting and knowingly benefitting from trafficking and forced labor, among other things). Congress has reauthorized the TVPA a number of times since its enactment. *International and Domestic Law*, U.S. DEP’T OF STATE, <https://www.state.gov/international-and-domestic-law/> [<https://perma.cc/Y5ZR-FE6E>].

engaged in [forced labor], knowing or in reckless disregard of the fact that the venture has engaged in [forced labor].”⁴⁰

Additionally, “[w]hoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment” could now be prosecuted for fraud in foreign labor contracting.⁴¹

The Department of Justice, the Department of State, and the Department of Homeland Security hold primary responsibility for investigating these trafficking violations.⁴² The criminal penalty for labor trafficking and knowingly benefitting from forced labor is a monetary fine plus imprisonment for a maximum of twenty years.⁴³ A conviction for fraud in foreign labor contracting results in imprisonment for a maximum of five years.⁴⁴ All three crimes are felonies.⁴⁵ Furthermore, upon conviction of each, the court shall order

40. William Wilberforce Trafficking Victims Protection Reauthorization Act § 222(b)(3) (codified at 18 U.S.C. § 1589(b)). 18 U.S.C. § 1593A separately criminalizes “knowingly benefit[ing], financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of this chapter,” including the forced labor and labor trafficking statutes. 18 U.S.C. § 1593A. Due to the courts’ overlapping focus in assessing what amounts to “knowingly benefits” (in §§ 1589(b) and 1593A), this additional offense will not be discussed further. Briana Beltran, *The Hidden “Benefits” of the Trafficking Victims Protection Act’s Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 253–54 (2020).

41. William Wilberforce Trafficking Victims Protection Reauthorization Act § 222(e)(2) (codified at 18 U.S.C. § 1351). Subsection (b) of § 1351 also addresses recruitment for government contracting jobs outside of the U.S., but this Note will only discuss recruitment *into* the U.S. § 1351.

42. U.S. DEP’T OF STATE, OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., 2023 TRAFFICKING IN PERSONS REPORT: UNITED STATES (2023) [hereinafter 2023 TIP REPORT], <https://www.state.gov/reports/2023-trafficking-in-persons-report/united-states> [<https://perma.cc/5JMQ-D529>].

43. § 1590; § 1589(b). The statute caps fines at \$250,000 for individuals and \$500,000 for organizations. 18 U.S.C. § 3571(b)(3), (c)(3). Instead of imprisonment, a defendant convicted for one of these crimes may be subject to probation. 18 U.S.C. § 3561.

44. § 1351. The same caps on fine and allowance for probation that apply to convictions of labor trafficking and knowingly benefitting from forced labor apply to convictions of fraud in foreign labor contracting. § 3571(b)(3), (c)(3); § 3561; *see supra* note 43.

45. 18 U.S.C. § 3559(a)(3), (4) (establishing labor trafficking and knowingly benefitting from forced labor as class C felonies and fraud in foreign labor contracting as a class D felony).

the trafficker to pay restitution to any survivors.⁴⁶ Migrant survivors can also apply for special visas that may lead to permanent residency.⁴⁷

2. *Extraterritorial Application*

In 2000, Congress's findings in the TVPA specifically addressed trafficking in persons as a transnational and international crime.⁴⁸ The TVPA's subsequent reauthorization in 2008 reinforced Congress's purpose of prosecuting trafficking as it occurs across and within U.S. borders, particularly by extending extraterritorial jurisdiction:

[T]he courts of the United States have extra-territorial jurisdiction over any offense . . . if— (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence . . . ; or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.⁴⁹

As such, actions in service of recruiting migrants occurring outside the U.S. may be prosecuted in the U.S. as long as the trafficker is either

46. 18 U.S.C. § 1593. Despite a court's mandate to order restitution following a conviction or plea for labor trafficking or knowingly benefitting from forced labor, "courts rarely order restitution." ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., UNITED STATES FEDERAL COURTS' CONTINUING FAILURE TO ORDER MANDATORY CRIMINAL RESTITUTION FOR HUMAN TRAFFICKING VICTIMS 1, 4-5 (2018), <https://www.htlegalcenter.org/wp-content/uploads/2018-Mandatory-Restitution-Report.pdf> [<https://perma.cc/848M-X4GZ>]. "[E]ven when restitution is ordered, trafficking victims rarely receive these funds." *Id.* at 1.

47. 2023 TIP REPORT, *supra* note 42.

48. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(24), 114 Stat. 1464, 1469 (2000) ("Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses."). Despite this transnational and international focus, Congress has also sought to address domestic trafficking. *See, e.g., id.* § 105 (including data collection on domestic trafficking as part of the interagency task force duties); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. II, 122 Stat. 5044, 5044 (2008) (listing title II as "Combating Trafficking in Persons in the United States").

49. William Wilberforce Trafficking Victims Protection Reauthorization Act § 223(a) (codified at 18 U.S.C. § 1596(a)). In addition to extraterritorial jurisdiction, U.S. courts also have the commonly thought-of jurisdiction over trafficking that occurs within U.S. territory. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 402(1)(a), (b) (AM. L. INST. 2018).

a U.S. national or permanent resident, or is present in the U.S.⁵⁰ A trafficker cannot be prosecuted, however, if a foreign government “has prosecuted or is prosecuting such person for the conduct constituting such offense.”⁵¹ Furthermore, despite the number of trafficking-related crimes, this statute provides that extraterritorial jurisdiction only applies to the peonage, enticement into slavery, involuntary servitude, forced labor, labor trafficking, and sex trafficking statutes.⁵² As such, labor trafficking and knowingly benefitting from forced labor apply extraterritorially under the statute, but fraud in foreign labor contracting does not.⁵³

3. *The Current State of Labor Trafficking Prosecutions*

Although the labor trafficking, *knowingly benefitting from forced labor*, and *fraud in foreign labor contracting* statutes may provide avenues to hold a stand-alone recruiter making misrepresentations to a migrant accountable, prosecution under these statutes is rare.⁵⁴ Since the TVPRA’s enactment almost fifteen years ago, approximately thirty cases have included a charge for either knowingly benefitting from forced labor or fraud in foreign labor contracting.⁵⁵ In terms of

50. § 1596(a).

51. *Id.* § 1596(b).

52. *Id.* § 1596.

53. *Id.*; see 18 U.S.C. §§ 1351, 1589(b), 1590.

54. See *supra* note 12 (citing thirty-four convictions under 18 U.S.C. § 1590 over the course of fourteen years); see *infra* notes 55–58 and accompanying text.

55. United States v. Yannai, 791 F.3d 226, 230 (2d Cir. 2015) (dealing with at least one fraud in foreign labor contracting-related charge); Indictment at 1, United States v. Alhunaif, No. 1:22-cr-00538-JSR (S.D.N.Y. Oct. 11, 2022) (same); Amended Plea Agreement at 1, United States v. Balcazar, No. 3:21-CR-834-SAL (D.S.C. Sept. 13, 2022) (same); Indictment at 8, United States v. Huaracha-Escamilla, No. 2:20-cr-00070 (N.D. Tex. Aug. 12, 2020) (same); Indictment at 1, United States v. Villanueva, No. 2:17-cr-00592-DRH-AKT (E.D.N.Y. Oct. 26, 2017) (same); Rahman Indictment, *supra* note 8, at 1–2 (same); Sealed Complaint at 2–3, United States v. Rashid, No. 1:17-mj-04658-UA (S.D.N.Y. June 19, 2017) (same); Indictment at 1, United States v. Hart, No. 1:17-cr-00002 (D.N. Mar. I. Mar. 9, 2017) (same); Indictment at 1, United States v. Kartan, No. 2:16-CR-00217-MCE (E.D. Cal. Nov. 17, 2016) [hereinafter Kartan Indictment] (same); Indictment at 13, United States v. Kurusu, No. 4:16-cr-00196-RAJ (W.D. Tex. May 12, 2016) (same); Cabrera Indictment, *supra* note 12, at 5, 13 (same); Sealed Indictment at 6, United States v. Khimani, No. 1:14-cr-00455-PGG (S.D.N.Y. July 9, 2014)

trafficking generally, investigations and prosecutions disproportionately center around sex trafficking.⁵⁶ For example, “[o]f [the] DOJ’s [fiscal year] 2022 investigations, 613 involved predominantly sex trafficking and 55 involved predominantly labor trafficking, compared with 573 and 26, respectively, in [fiscal year] 2021.”⁵⁷ In some states, labor trafficking prosecutions are not pursued at all.⁵⁸

A substantial number of factors contribute to this “overall disparity” between sex trafficking and labor trafficking.⁵⁹ In the years following the enactment of the TVPA, former President George W. Bush and his administration focused their anti-trafficking efforts on sex trafficking

(same); Plea Agreement at 2, *United States v. Miller*, No. 4:14-cr-00409-RBH (D.S.C. Sept. 3, 2014) (same); Criminal Complaint at 1, *United States v. Raju*, No. 3:12-cr-00391-RJC-DCK (D.N.C. Nov. 28, 2012) (same); Indictment at 1, *United States v. Vadivallo*, No. 1:12-cr-00055 (D. Guam Aug. 22, 2012) (same); Criminal Complaint at 1, *United States v. Liu*, No. 4:11-cr-00284-DGK (W.D. Mo. Nov. 10, 2011) (same); Criminal Docket, *United States v. Ma*, No. 1:11-cr-00013 (N. Mar. I. June 2, 2011) (same); First Superseding Indictment at 1, *United States v. Askarkhodjaev*, No. 4:09-00143-ODS (W.D. Mo. Jan. 7, 2010) [hereinafter *Askarkhodjaev Indictment*] (same); *United States v. Paz-Rodriguez*, No. 20-CR-82-JED, 2020 U.S. Dist. LEXIS 171311, at *2–3 (N.D. Okla. Sept. 18, 2020) (dealing with at least one knowingly benefitting from forced labor-related charge); *United States v. McTague*, No. 5:14-CR-055, 2017 U.S. Dist. LEXIS 68598, at *12 (W.D. Va. Apr. 10, 2017) (same); Indictment at 1, *United States v. Landaverde*, No. 4:22-cr-00092-EWH-DEM (E.D. Va. Nov. 15, 2022) (same); Indictment at 16–17, *United States v. Zelaya-Mejia*, No. 7:20-cr-00191-BO (E.D.N.C. Oct. 28, 2020) [hereinafter *Zelaya-Mejia Indictment*] (same); Indictment at 4–5, *United States v. Luu*, No. 3:19-cr-04970-JM (S.D. Cal. Dec. 10, 2019) [hereinafter *Luu Indictment*] (same); Indictment at 3, *United States v. Jumroon*, No. 3:18-cr-00255-BR (D. Or. May 25, 2018) (same); Sealed Indictment at 1, *United States v. Keaton*, No. 2:16-cr-20051-JAR (D. Kan. June 8, 2016) (same); Plea Agreement at 2, *United States v. Shabazz*, No. 2:12-cr-00033-JLR (W.D. Wash. May 25, 2012) (same); Superseding Indictment at 1, *United States v. Wiggins*, No. 3:11-cr-02420-FM (W.D. Tex. Nov. 9, 2011) (same); Superseding Indictment at 1, *United States v. Rivera*, No. 2:09-cr-00619-JMA (E.D.N.Y. May 18, 2011) (same).

56. LANE ET AL., *supra* note 25, at 19, 92; Miller, *supra* note 34.

57. 2023 TIP REPORT, *supra* note 42. Furthermore, in labor trafficking criminal cases and convictions, stand-alone recruiters are generally not defendants, despite evidence of their involvement in the trafficking scheme. *E.g.*, *Criminal Section Selected Case Summaries*, *supra* note 12. *But see* David v. Signal Int’l, LLC, 37 F. Supp. 3d 822, 825 (E.D. La. 2014) (demonstrating that in civil cases, survivors sue the non-employer recruiters).

58. *See* LAUGER & DUROSE, *supra* note 25, at 3 (reporting that only sixteen states made an arrest for labor trafficking in 2020).

59. LANE ET AL., *supra* note 25, at 92. Other factors not discussed in this Note include inherent flaws in the immigration system, migrant workers’ potential fears of reporting abuse due to their immigration status or related coercive measures like threats to their status, misconceptions that trafficking requires force, and hesitation in pursuing claims involving psychological coercion. Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 502–03, 506–09 (2020); Miller, *supra* note 34.

of women and children.⁶⁰ The administration's focus, combined with disproportionate media coverage, created a misconception that sex trafficking is the exclusive form of trafficking in persons.⁶¹ The simplistic narrative of good versus evil when discussing sex trafficking is also "much easier to explain to the general populace than the complex, multilayered narrative concerning the destabilizing effects of globalization and the resulting transnational flow of capital, goods, and people."⁶² The relationship between migrant smuggling and labor trafficking further increase this complexity.⁶³ Survivors are largely

60. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1680 (2010) (quoting a 2002 presidential directive that associated trafficking with prostitution and related activities); *id.* at 1680 n.99 (pointing out former President Bush's emphasis on sex trafficking when discussing human trafficking during his annual U.N. address); *id.* at 1681–82 (discussing the Bush Administration's focus on eradicating prostitution through anti-trafficking efforts).

61. Smith, *supra* note 59, at 504 ("One of the most persistent myths about human trafficking is that it consists exclusively of sex trafficking."); Chuang, *supra* note 60, at 1697 ("The vast majority of documentaries and films on trafficking focus on sex-sector trafficking."); Miller, *supra* note 34 (stating that media attention disproportionately focuses on sex trafficking, with labor trafficking existing as "an afterthought, if a thought at all").

62. Chuang, *supra* note 60, at 1698–99. Chuang further elaborates:

The reductive narrative of trafficking as being about women and children forced into prostitution resonates because of its simple narrative structure, with a bad guy (evil trafficker or deviant, sex-crazed male) doing bad things (sexual violence or enslavement) to an innocent, ignorant, impoverished victim (trafficked woman or child, sex slave, or prostitute). The imprisoned nanny or the forced male farm worker is not nearly so compelling an object of pity or compassion as a brothel captive. The tendency to assume that the nanny and male farm worker are illegal migrants masks the reality that many cross borders legally. And even if they do not, the notion that consent to cross borders illegally does not translate into consent to all subsequent exploitation is harder to sell than the standard sex-sector trafficking narrative of innocence debauched. Migrants exploited in fields, farms, restaurants, hair and nail salons, homes, and factories are par for the course in the United States, their exploiters quite possibly our neighbors, colleagues, and friends. The sense of urgency and threat to "our" communities is far greater when it comes to "loose" modern sexual mores, which can coerce or lure "our" daughters, sisters, and wives into the sex industry.

Id. at 1698; *id.* at 1683 ("Rather than a complex phenomenon driven by deep economic disparities between wealthy and poor communities and nations, and by inadequate labor and migration frameworks to manage their consequences, neo-abolitionism constructs trafficking as a moral or social problem driven by social deviance or entrenched male patriarchy.").

63. Raigrodski, *supra* note 21, at 107 n.166 (discussing how migrant smuggling and trafficking in persons fall on "a continuum of rational and less-to-more exploitative responses to the contradictory international economic and migration systems"); Jayashri Srikantiah, *Perfect Victims and Real Survivors*:

seen as economic migrants who enter the U.S. illegally and take employment opportunities from U.S. citizens; therefore, they receive less public sympathy.⁶⁴

These factors lead to insufficient training, time, and resources directed at investigating and prosecuting labor trafficking.⁶⁵ Furthermore, law enforcement and prosecutors alike may view pursuing those in the business community as “challenging and politically unpopular.”⁶⁶ This risk, along with the lack of resources, disincentivizes the pursuit of labor trafficking cases.⁶⁷ Prosecutors face additional barriers, including concerns regarding proof, perceived

The Iconic Victim in Domestic Human Trafficking Law, 87 B.U. L. REV. 157, 191–92 (2007) (stating that U.S. agencies “have tried to draw a clear distinction between trafficking victims and smuggled migrant” but ultimately “provide no explicit guidance” other than a need for evidence of fraud, force, or coercion in trafficking cases); Srikantiah, *supra*, at 192 (“Whereas undocumented migrants are presumed to exercise free will in making the decision to cross the border illegally, trafficking victims are presumed to cross the border under the control of the trafficker.”). In particular:

[T]he difficulty is that smuggling and trafficking are hard to distinguish from one another. The typical undocumented economic migrant is propelled by various forms of atmospheric “push” factors, ranging from dire economic conditions and political instability to strained family circumstances. The difference between the typical economic migrant and the trafficking victim is that the trafficking victim is influenced not only by these factors, but also by the actions of an individual wrongdoer: the trafficker.

Srikantiah, *supra*, at 192–93 (providing a hypothetical, where a trafficker-recruiter uses false promises, to indicate how migrant smuggling may turn into labor trafficking).

64. Chuang, *supra* note 60, at 1698 (pointing to society’s inclination to assume all migrants came to the U.S. illegally and to therefore accept their exploitation); Srikantiah, *supra* note 63, at 190 (“The undocumented migrant is characterized as an economic migrant who takes jobs from U.S. residents, and drains welfare and other social services.”); see Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 607 (2009) (“[O]therness’ is a root cause of both inaction and the selective nature of responses to the abusive practice of human trafficking. Otherness, with its attendant devaluation of the Other, facilitates the abuse and exploitation of particular individuals.”). Additionally, the “iconic” trafficking victim centers around a woman or child in need of rescue from immoral sexual activities, which “distances trafficking victims from the ‘illegal alien’ stereotype, thus avoiding any association with economic migration.” Srikantiah, *supra* note 63, at 187–88.

65. Smith, *supra* note 59, at 504, 512. As Miller comments:

Experts and advocates alike describe a self-perpetuating cycle, wherein agencies may not direct resources toward labor trafficking because the issue is rarely the focus of media attention. Prosecutors may be swayed by greater public sympathy for victims of sex trafficking, they say, than for labor trafficking victims. They say that . . . law enforcement officials are often unfamiliar with how to investigate labor trafficking cases.

Id. at 504 n.173 (quoting Miller, *supra* note 34).

66. *Id.* at 517; see also Raigrodski, *supra* note 21, at 86 (“The dominant narrative of trafficking as an aberrant criminal activity of ‘bad apples,’ however, serves to mask the direct complicity and significant economic benefits gained by governments, businesses, and members of society through the facilitation and furthering of exploitation through human trafficking . . .”).

67. Smith, *supra* note 59, at 521.

issues with survivors such as unlawful presence, and historical protections for employers.⁶⁸

For a number of reasons, the Obama Administration shifted the focus of federal anti-trafficking efforts to include non-sex-sector trafficking in 2009.⁶⁹ Although this “ma[de] the link between trafficking and ‘labor’ much more visible and explicit,” other barriers, such as decreased public sympathy, remained.⁷⁰ As such, the investigation and prosecution of trafficking in persons at the federal level is still heavily focused on sex trafficking.⁷¹

C. *Alternative Theory of Liability: State Law*

Limitations on labor trafficking prosecutions create a need to find alternative avenues to hold stand-alone recruiters accountable. State employment agency laws may provide a promising avenue of liability for stand-alone recruiters.⁷² Twenty-nine U.S. states address and regulate a form of employer misrepresentations “for the purpose of protecting applicants for employment against moral as well as financial exploitation.”⁷³ Employment agencies are prohibited from

68. *Id.* at 499–500, 517–18, 519, 521.

69. Chuang, *supra* note 25, at 613, 619 (suggesting the shift in focus reflected a desire “to address a wider range of exploitation” and “to maintain U.S. dominance in global anti-trafficking policy,” as well as “a strategic effort to prioritize a criminal justice framing and approach to the problem”).

70. *Id.* at 619.

71. *See supra* notes 54–58 and accompanying text. Even in the last year of the Obama Administration, sex trafficking still dominated the number of trafficking prosecutions. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 416 (2017), <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf> [<https://perma.cc/P97U-LPG9>] (reporting that, of 241 total prosecutions, 228 predominately involved sex trafficking in fiscal year 2016, compared to thirteen involving labor trafficking).

72. ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/99MZ-H7B9>] (“Indeed, the civil cause of action has proven particularly critical to survivors of forced labor. In labor sectors ranging from agriculture to hospitality to domestic work, trafficking survivors have filed cases to hold their traffickers accountable – and to win compensation.”).

73. H.B. Chermiside, Annotation, *Regulations of Private Employment Agencies*, 20 A.L.R.3d 599 § 2 (1968); accord Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 4, 56

making false promises or misrepresentations regarding a job.⁷⁴ Generally, states define employment agencies as anyone engaged in procuring and securing employment for an applicant.⁷⁵ Therefore, the prohibitions apply to businesses, as well as individual recruiters acting as third parties for employment and staffing purposes.⁷⁶ The defining statutes, however, often exclude certain organizations like charities, recruiters who receive a fee from the employer instead of the applicant, or agencies procuring only temporary employment for an applicant.⁷⁷

(1997) (discussing the state tort claims of fraudulent misrepresentation and negligent misrepresentation, where an employer may, either intentionally or carelessly, misrepresent “the terms and conditions of employment or the fact of employment itself, to an applicant during the hiring, interviewing, and recruitment process”); Cavico, *supra*, at 6, 57–58 (listing the elements of fraudulent misrepresentation and negligent misrepresentation, which include proof of “intent to induce” reliance on misrepresentations concerning employment and “justifiable reliance on the misrepresentation by the plaintiff”); *see infra* Section II.B.

74. *E.g.*, 225 ILL. COMP. STAT. ANN. 515/10 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.) (stating employment agencies shall not “knowingly give any false or misleading information[] or make any false or misleading promise to any applicant who shall apply for employment”); N.Y. GEN. BUS. LAW § 187(2) (McKinney, Westlaw through L.2023, chs. 1 to 191) (stating that employment agencies shall not “[p]ublish or cause to be published any false, fraudulent or misleading information, representation, promise, notice or advertisement”).

75. *E.g.*, COLO. REV. STAT. ANN. § 18-5-307(1)(c)(I) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb. (2023)) (defining employment agency as “any nongovernmental person, firm, association, or corporation which secures or attempts to secure employment, arranges an interview between an applicant and a specific employer other than itself, or . . . holds itself out to a prospective applicant as able to secure employment for the applicant”); HAW. REV. STAT. ANN. § 373-1 (West, Westlaw through Act 102 of 2023 Reg. Sess.) (defining employment agency as “any individual, partnership, corporation, or association engaged in the business of providing employment information, procuring employment for applicants, or procuring employees for placement with employers upon request, for a fee or other valuable thing, exacted, charged, or received”).

76. *See supra* note 75 and accompanying text.

77. *E.g.*, KAN. STAT. ANN. § 44-401(e)(2) (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.); OKLA. STAT. ANN. tit. 40, § 52(e) (West, Westlaw through 1st Reg. Sess. of 59th Leg. and the 1st Extraordinary Sess. of 59th Leg. (2023)). Some states maintain a long list of exclusions. For example, Kansas excludes:

- (A) Any educational, religious, charitable, fraternal or benevolent organization which charges no fee for services rendered in securing employment or providing information about employment;
- (B) any employment service operated by the state, the United States or any political subdivision of the state, or any agency thereof;
- (C) any temporary help service that at no time advertises or represents that its employee may, with the approval of the temporary help service, be employed by one of its client companies on a permanent basis;

Across the twenty-nine states prohibiting fraudulent recruitment practices, violations are investigated and enforced by a number of state agencies, including the department of labor (or related entity), attorney general, or director of public safety.⁷⁸ Penalties vary from merely suspending the employment agency's license to fining the agency to prosecuting it for a misdemeanor.⁷⁹ Two states only allow for a license suspension if an agency misrepresents a job, two other states provide an avenue for court action to stop such misrepresentations, and another two merely impose a civil penalty.⁸⁰ For the remaining twenty-three states that regulate misrepresentations in the employment agency context, the relevant state law mandates, at minimum, that a convicted agency be subjected to a criminal fine.⁸¹ The fines fluctuate from only \$10 up to \$4,000, with most states setting the fine at \$500 or \$1,000.⁸² Eighteen of these states also provide for a period of imprisonment, ranging from a maximum of three months to one year.⁸³

(D) any newspaper or publication of general circulation;

(E) any radio or television station; or

(F) any employment service where the fee is paid by the employer.

KAN. STAT. ANN. § 44-401(e)(2) (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.). Conversely, although still relatively broad in nature, other states minimize the number of excluded categories. Massachusetts's definition, for example, only excludes agencies whose fees are not paid "either directly or indirectly by any applicant for employment, unless [it] is engaged in providing domestic employees." MASS. GEN. LAWS ANN. ch. 140, § 46A (West, Westlaw through ch. 6 of 2023 1st Annual Sess.).

78. *See infra* Appendix. In some states, the statutory language implies which state agency handles enforcement, while in others an explicit article of enforcement exists. *See* statutes cited *infra* Appendix. Three states, however, have repealed their enforcement statute without designating a new agency to handle investigation of the relevant prohibitions or adding language into the existing statute to imply which agency will now enforce the prohibition. *Id.*; *see e.g.*, MD. CODE ANN., BUS. REG. §§ 9-203 to -209 (West, repealed 2003); TEX. OCC. CODE ANN. §§ 2501.151 to .154 (West, repealed 2011); 2008 Utah Laws 1539 (including Senate Bill 60, which repealed "the responsibilities of the Labor Commission related to employment agencies").

79. *See infra* Appendix. Many states also require employment agencies to have a license to operate, and if they proceed without a license, further penalties apply. *E.g.*, N.C. GEN. STAT. ANN. § 95-47.9(e) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.) (providing that anyone who operates without a license is guilty of a misdemeanor and subject to a daily fine). Some states also allow the pursuit of a civil remedy following a violation of the statute. *E.g.*, CAL. CIV. CODE § 1812.523 (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.); TEX. OCC. CODE ANN. § 2501.201 (West, Westlaw through 2023 Reg. Sess. of 88th Leg.).

80. *See infra* Appendix.

81. *Id.*

82. *Id.*

83. *Id.*

II. ANALYSIS

A. *Federal Crimes Addressing Labor Trafficking and Recruiters*

The labor trafficking, *knowingly benefitting from forced labor*, and *fraud in foreign labor contracting* statutes appear to provide a basis of liability for a stand-alone recruiter misrepresenting employment and living conditions to a migrant.⁸⁴ Further investigation into the elements of each, however, indicates this assumption may be inaccurate, at least in regard to the former two crimes.

1. *Recruitment for Labor Trafficking*

Under 18 U.S.C. § 1590, individuals who knowingly recruit a person by fraud, force, or coercion for the purpose of obtaining their labor can be prosecuted.⁸⁵ This purpose element requires establishment of a predicate offense—in particular, perpetration of forced labor.⁸⁶ Under § 1589(a), forced labor refers to knowingly obtaining labor by at least one of the listed means:

84. Limited criminal case law exists interpreting these statutes, so civil cases generally provide the basis of understanding the elements in this Note. Differences in general statutory canons of construction between criminal and civil cases revolve around the exception of interpreting ambiguity in favor of the defendant, in avoidance of surplusage, and in favor of a *mens rea* requirement. See CONG. RSCH. SERV., NO. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 15, 33–34 (2014), https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf [<https://perma.cc/J5MT-53XV>]. Therefore, this Note will provide additional considerations of each of these canons, where necessary, in analyzing the civil case law.

85. 18 U.S.C. § 1590.

86. *Id.* (requiring a violation of Chapter 77 of Title 18 to be guilty of labor trafficking under 18 U.S.C. § 1590); *United States v. Paz-Rodriguez*, No. 20-CR-82-JED, 2020 U.S. Dist. LEXIS 171311, at *11 (N.D. Okla. Sept. 18, 2020) (confirming the need for a jury finding of at least one predicate offense established in Chapter 77 of Title 18). While peonage, involuntary servitude, and slavery could fulfill this requirement, this Note will focus on labor trafficking in respect to forced labor (under 18 U.S.C. § 1589(a)). Generally, peonage, involuntary servitude, and slavery charges appear to be brought infrequently on their own or as a predicate to labor trafficking (less than five cases each since 2000). Even in cases where charges involve peonage or involuntary servitude, forced labor is either the actual predicate or an additional predicate to the labor trafficking charge. See, e.g., *Luu Indictment at 1*, *supra* note 55 (specifying trafficking in forced labor); *Indictment at 5*, *United States v. Paz-Rodriguez*, No.

- (1) . . . force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) . . . serious harm or threats of serious harm to that person or another person;
- (3) . . . the abuse or threatened abuse of law or legal process;
- or
- (4) . . . any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint⁸⁷

As such, § 1589(a) requires the defendant to be liable as a principal engaged directly in the forced labor, which poses an issue in prosecuting stand-alone recruiters.⁸⁸ A recruiter must have coerced the victim into performing the labor using one of the listed means. Regardless of whether recruiters engage in such types of coercion, stand-alone recruiters do not directly obtain the victim’s labor.⁸⁹ A

4:20-CR-00082-JED (N.D. Okla. July 7, 2020) (listing count four as labor trafficking in violation of involuntary servitude and forced labor). Additionally, forced labor tends to be a primary focus of government and NGO reporting and research. *E.g.*, *Fact Sheet: Human Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., OFF. ON TRAFFICKING IN PERS., <https://www.acf.hhs.gov/otip/fact-sheet/resource/fshumantrafficking> [<https://perma.cc/Y5TP-LMFE>] (suggesting that involuntary servitude, peonage, debt bondage, and slavery qualify as forms of forced labor); *What Is Modern Slavery?*, *supra* note 25 (conflating forced labor with labor trafficking); *see generally* LANE ET AL., *supra* note 25; FREE THE SLAVES & HUM. RTS. CTR., *HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES* (2004), <https://humanrights.berkeley.edu/sites/default/files/publications/hidden-slaves-september-2004.pdf> [<https://perma.cc/4KKD-PRSS>].

87. 18 U.S.C. § 1589(a).

88. *Paz-Rodriguez*, 2020 U.S. Dist. LEXIS 171311, at *6 (“In order to prove a violation of *subsection (a)*, the government must prove that the defendants knowingly obtained or provided labor through one of the prohibited means.”).

89. A depth of case law exists interpreting § 1589(a). Eunice Hyunhye Cho, Giselle A. Hass & Leticia M. Saucedo, *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, 39–40 (2014) (compiling cases evaluating what constitutes “force, threats, physical restraint, harm, abuse of the legal process or other forms of victimization”). Prosecution of stand-alone recruiters, who often use false promises, would likely not meet the coercion standard either. *Castellanos v. Worldwide Distrib. Sys. USA, LLC*, No. 2:14-cv-12609, 2016 U.S. Dist. LEXIS 200071, at *15 (E.D. Mich. June 20, 2016) (“Considering the context of the statute, which otherwise concerns the *coercion* of people through the use or threat of violence, serious harm, or physical restraint, the Court does not believe that the *enticement* of individuals through a potentially fraudulent job offer is contemplated under § 1589.”).

stand-alone recruiter cannot be prosecuted under § 1590 without first satisfying the elements of § 1589(a).⁹⁰ The absence of cases prosecuting stand-alone recruiters (compared to recruiter-employers) for a § 1590 violation reflects this high standard requiring the recruiter to also be the employer.

2. *Knowingly Benefitting from Forced Labor*

a. *Interpreting the Elements*

Section 1589(b) requires a defendant (recruiter) to knowingly benefit from participation in a venture where the venture is engaged in forced labor under § 1589(a), and the recruiter knew of or recklessly disregarded such engagement.⁹¹ Courts have focused primarily on evaluating what it means to financially benefit, what constitutes a venture, and what satisfies knowledge or reckless disregard.⁹² Although court analysis often conflates these three distinct elements, an evaluation of the case law can still provide a general interpretation of each.⁹³

First, § 1589(b) refers to “benefits, financially or by receiving anything of value.”⁹⁴ Interpretation of the first factor, financial benefits, has so far been clear-cut: “Courts have concluded that income tied to a business relationship is sufficient, whether its source is the victims of forced labor, other members of the venture, or third

90. *Paz-Rodriguez*, 2020 U.S. Dist. LEXIS 171311, at *11; *Estavilla v. Goodman Grp., LLC*, No. CV 21-68-M-KLD, 2022 U.S. Dist. LEXIS 31751, at *47 (D. Mont. Feb. 23, 2022) (“Because [the survivor] has not sufficiently alleged that [the survivor] was subjected to forced labor, [the survivor] has not stated a claim for relief under § 1590.”).

91. § 1589(b).

92. Beltran, *supra* note 40, at 255. The first knowledge element has not been the focus of interpretation and is largely ignored, perhaps due in part to its existing history in criminal law and to the comparatively straightforward nature of proving a defendant knew they received benefits. *Id.* at 263 n.178. Courts have acknowledged in passing that establishing a primary offender’s liability (i.e., the venture’s involvement in forced labor) is “a necessary element” and proceed to perform analysis pursuant to § 1589(a). *E.g.*, *Bistline v. Parker*, 918 F.3d 849, 871 (10th Cir. 2019).

93. Beltran, *supra* note 40, at 262.

94. § 1589(b).

parties.”⁹⁵ Furthermore, as established by the First Circuit, the financial benefits do not have to meet a minimum value.⁹⁶ As to the second factor, courts so far have not directly addressed what constitutes anything of value.⁹⁷ Dicta, as well as case law under 18 U.S.C. § 1591, suggest this term is “not limited to direct receipt of money alone.”⁹⁸

Second, § 1589(b) requires participation in a venture, and courts apply the definition of venture established in 18 U.S.C. § 1591.⁹⁹ The

95. Beltran, *supra* note 40, at 262; *accord, e.g.*, Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 934, 951–53 (N.D. Cal. 2019) (finding Tesla benefitted from an agreement with a subcontractor “install[ing] a paint shop at a Tesla facility,” where migrants “allegedly worked at least 10 and on average 12 hours a day, over 80 hours a week, and received only 1 day in 14 off”); Ricchio v. Bijal, Inc., 386 F. Supp. 3d 126, 127, 131 (D. Mass. 2019) (finding a financial benefit arising out of renting a motel room to an alleged sex trafficker, where the defendants held a familial relation to the motel owners and lived and worked at the motel, because “it could be reasonably inferred that the [defendants] had a financial stake in the success of the motel”); Paguirigan v. Prompt Nursing Emp. Agency, No. 17-cv-1302 (NG) (JO), 2019 U.S. Dist. LEXIS 165587, at *8, *55–56 (E.D.N.Y. Sept. 23, 2019), *aff’d*, 827 F. App’x 116 (2d Cir. 2020) (finding financial benefits where the owners of nursing homes recruited Filipino nurses and assigned their contracts to a staffing agency allegedly engaged in forced labor); Gilbert v. U.S. Olympic Comm., 423 F. Supp. 3d 1112, 1139 (D. Colo. 2019) (finding the U.S. Olympic Committee benefitted from taekwondo coaches’ “actions, including by collecting money through sponsorships, licensing, grants, publicity, [and] for medals achieved at competitions”). The benefit does not have to be derived from the victim’s actual labor; a recruiter obtaining a fee from either the employee or employer would theoretically satisfy this element. Beltran, *supra* note 40, at 276. The specific issue of whether a defendant benefitted has not yet arisen in the criminal context. *See, e.g.*, United States v. Rivera, No. 09-CR-619(SJF), 2012 U.S. Dist. LEXIS 85090, at *18–24 (E.D.N.Y. June 18, 2012), *remanded on other grounds*, 799 F.3d 180 (2d Cir. 2015) (citing to a number of the defendant’s actions generally, with only passing mention of his receiving payment, authority as the bar owners’ “right-hand man,” and the ability to engage in sexual acts with the waitresses, as evidence he “benefitted from the services provided by the victims at the bars”).

96. *Ricchio*, 386 F. Supp. 3d at 131 (rejecting the argument that providing a sex trafficker a motel room in exchange for approximately \$140, before deduction of time and expenses for housekeeping, is “not the stuff upon which any plausible inference should be drawn nor something that a rational fact-finding jury would determine to have occurred”). As courts begin to address this element, they may require a certain threshold of value in a criminal case.

97. Beltran, *supra* note 40, at 276–77.

98. *Id.*

99. § 1589(b); Beltran, *supra* note 40, at 255. The District of Colorado turned to *Black’s Law Dictionary* instead, which defines venture as “[a]n undertaking that involves risk; esp[ecially] a speculative commercial enterprise.” *Venture*, BLACK’S LAW DICTIONARY (11th ed. 2019); *accord* Gilbert v. U.S. Olympic Comm., No. 18-cv-00981-CMA-MEH, 2019 WL 1058194, at *11 (D. Colo. Mar. 6, 2019), *rejected in part on other grounds* by 423 F. Supp. 3d 1112, 1137–38 (D. Colo. 2019). The District Court of Utah took a third approach and tried to define “participation in a venture” as requiring “some action to operate or manage the venture,” in accordance with the Racketeer Influenced and Corrupt

TVPA defined venture (as applied to sex trafficking) as “any group of two or more individuals associated in fact, whether or not a legal entity.”¹⁰⁰ The First Circuit was the first to adopt this definition in interpreting § 1589(b).¹⁰¹ In *Bistline v. Parker*, the Tenth Circuit agreed with the First Circuit’s decision and provided insight into which facts may support such an association.¹⁰² *Parker*, however, repeatedly refers to the defendant lawyers’ role in helping their client establish the forced labor scheme, even though the client was the one responsible for directly obtaining the forced labor.¹⁰³ Additionally, the facts “related more to defendants’ *knowledge* of the underlying forced labor than the *type of relationship* between the defendants and the perpetrator of the forced labor.”¹⁰⁴ Yet, courts commonly point to facts related to the financial benefits received or knowledge of the venture’s engagement in forced labor as evidence of the venture.¹⁰⁵

In addition to defining venture, courts have evaluated what it means to participate in the venture. The Western District Court of Virginia evaluated the language “participation in a venture which has engaged in the providing or obtaining of labor or services *by any of the means*

Organizations (RICO) Act. *Bistline v. Jeffs*, No. 2:16-CV-788 TS, 2017 U.S. Dist. LEXIS 4788, at *28–29 (D. Utah Jan. 11, 2017), *aff’d in part, rev’d in part sub nom.*, *Bistline*, 918 F.3d 849. The Tenth Circuit, however, rejected both the “common” and RICO Act definitions in favor of interpreting “venture” under 18 U.S.C. § 1591. *Bistline*, 918 F.3d at 873. Courts may favor the heightened RICO Act standard, however, in criminal cases. See CONG. RSCH. SERV., *supra* note 84, at 33; *Rivera*, 2012 U.S. Dist. LEXIS 85090, at *18–19, *22 (referring to a long list of the defendant’s actions, such as receiving payment from customers, threatening the waitresses, and monitoring the waitresses’ movements, all of which contributed to the basis he “benefitted from his participated in the operation of the bars”).

100. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1488 (2000) (previously codified at 18 U.S.C. § 1591(c)(3)).

101. *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (citing to the sex trafficking statute).

102. *Bistline*, 918 F.3d at 873–75 (pointing to the First Circuit’s evaluation of if a venture existed in *McLean*, then providing facts that the defendant law firm discussed its client’s forced labor activities and helped the defendant set up a trust account to hold funds received from a church congregation).

103. *Id.* at 874–75.

104. Beltran, *supra* note 40, at 258 (“Perhaps the attorney-client relationship between the attorney-defendants and Jeffs was enough to check the box from an analytical perspective as to ‘venture,’ but even if that is the case, it was not stated by the court in any clear way.”).

105. *Id.* at 262–63 (“[I]t is often the case that the receipt of financial benefits tends to be indicative of the existence of the venture itself.”); *United States v. Rivera*, No. 09-CR-619(SJF), 2012 U.S. Dist. LEXIS 85090, at *17–18, 21–22 (E.D.N.Y. June 18, 2012) (combining elements of the crime and listing the facts without distinguishing their relevance to each element), *remanded on other grounds to* 799 F.3d 180 (2d Cir. 2015).

described in subsection (a)” in *United States v. McTague*.¹⁰⁶ This court found the emphasized language to be an essential element of a § 1589(b) claim because “[a] contrary reading would allow the government to prove that a defendant financially benefited from forced labor without proving that the defendant forced someone into labor.”¹⁰⁷ *McTague* suggests the recruiter must have participated in forced labor, meaning the recruiter obtained forced labor.¹⁰⁸

By contrast, the District Court of Colorado rejected such an interpretation of § 1589(b) in defining participation in a venture in *Gilbert v. United States Olympic Committee*.¹⁰⁹ The plaintiffs, young female athletes, were not required to allege the U.S. Olympic Committee (USOC) “engaged in conduct that would also make it liable

106. 18 U.S.C. § 1589(b); *United States v. McTague*, No. 5:14-CR-055, 2017 U.S. Dist. LEXIS 68598, at *13–16 (W.D. Va. Apr. 10, 2017) (emphasis added).

107. *McTague*, 2017 U.S. Dist. LEXIS 68598, at *15–16 (citing § 1589(b)) (stating an indictment for § 1589(b) “must indicate that the defendants financially benefited from forcing others into labor ‘by any means described in subsection (a)’”).

108. Although this interpretation complies with the rule of lenity, it appears to create surplusage, or in the alternative, ignore certain words within the text. *Id.* (requiring the defendant’s direct involvement in forced labor for a conviction under § 1589(b), despite the availability of pursuing prosecution under § 1589(a)); *id.* (excluding participation in a venture from the required showing for an indictment in stating the indictment “must indicate that the defendants financially benefited from forcing others into labor”); see CONG. RSCH. SERV., *supra* note 84, at 14–15, 33. *McTague* also appears to ignore the grammatical structure of the text. See CONG. RSCH. SERV., *supra* note 84, at 13–14. The provision uses the word “which” to describe what is engaged in forced labor. § 1589(b). Well-understood grammar rules dictate that “which” always refers to “groups or things,” such as the venture here, while “who” would be necessary for the subsequent clause to apply to the defendant. *Who, That, Which*, GRAMMARBOOK.COM, <https://www.grammarbook.com/grammar/whoVwhVt.asp> [<https://perma.cc/GZ2M-7GQE>].

109. *Gilbert v. U.S. Olympic Comm.*, No. 18-cv-00981-CMA-MEH, 2019 WL 1058194, at *10–11 (D. Colo. Mar. 6, 2019), *rejected in part on other grounds by* 423 F. Supp. 3d 1112 (D. Colo. 2019). A number of other courts also reject the interpretation proposed in *McTague*. *United States v. Paz-Rodriguez*, No. 20-CR-82-JED, 2020 U.S. Dist. LEXIS 171311, at *6–7 (N.D. Okla. Sept. 18, 2020) (“[A] person can be guilty under [§ 1589(b)] even if he himself does not provide or obtain labor through prohibited means.”). As the Second Circuit stated:

[T]he government was not required to prove beyond a reasonable doubt that [the defendant] hired any of the victims or withheld their wages in order to find him guilty of forced labor under 18 U.S.C. § 1589 (2009), as Section 1589(b) expressly provides that a defendant who “knowingly benefits . . . from participation in a venture which has engaged in” forced labor is also guilty of violating the statute.

Rivera, 2012 U.S. Dist. LEXIS 85090, at *17–18.

as the principal under § 1589(a).”¹¹⁰ “[T]his interpretation would render § 1589(b) redundant, and courts should not interpret a statute so as to make an entire provision redundant.”¹¹¹ The USOC’s association with taekwondo coaches who obtained sexual services from the girls was sufficient—it need not have participated in the forced labor.¹¹²

Third, a recruiter must have participated in the venture with knowledge or reckless disregard of the venture’s engagement in forced labor.¹¹³ Courts use a fact-specific analysis in determining whether this element is satisfied.¹¹⁴ Certain fact patterns, such as a defendant interacting with the victims on a number of occasions or receiving reports of abuse, have generally fulfilled this requirement.¹¹⁵ Furthermore, evidence of the defendant’s active involvement in establishing the venture and its engagement in forced labor “show[s] awareness of the underlying forced labor.”¹¹⁶

Although courts may conflate certain elements of knowingly benefitting from forced labor, or at minimum use evidence of one element as proof of another, what constitutes a benefit and what

110. *Gilbert*, 2019 WL 1058194, at *2, *11; *accord* *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1138 (D. Colo. 2019) (“Section 1589(b) does not require a member of a venture to have committed overt acts in furtherance of obtaining forced labor or services”). Courts have established subsections 1589(a) and (b) as two separate crimes. *United States v. Toviave*, No. 11-20259, 2013 WL 474528, at *1 (E.D. Mich. Feb. 7, 2013); *Bistline v. Parker*, 918 F.3d 849, 871 (10th Cir. 2019) (“One can violate [§ 1589] either as a primary offender or simply by benefiting financially from participation in a ‘venture’ with the primary offender.”).

111. *Gilbert*, 2019 WL 1058194, at *11.

112. *Id.* at *8, *11; *Gilbert*, 423 F. Supp. 3d at 1137–38.

113. 18 U.S.C. § 1589(b). Although not explicitly addressed as of yet, courts appear to include constructive knowledge under this *mens rea* requirement. *See infra* notes 115–16 and accompanying text; *see* KEVIN F. O’MALLEY, JAY E. GREINIG & HON. WILLIAM C. LEE, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104:24 (6th ed. 2022) (explaining that a defendant has constructive knowledge when they have information that would cause a reasonable person to inquire further and actually learn the relevant facts).

114. Beltran, *supra* note 40, at 265.

115. *E.g.*, *United States v. Rivera*, No. 09-CR-619(SJF), 2012 U.S. Dist. LEXIS 85090, at *21–22 (E.D.N.Y. June 18, 2012) (reinforcing that the defendant transported, auditioned, threatened, and engaged in sexual acts with the victims), *remanded on other grounds* by 799 F.3d 180 (2d Cir. 2015); *Lesnik v. Eisenmann SE*, 374 F. Supp. 3d 923, 953 (N.D. Cal. 2019) (finding a contractor and Tesla “knew or should have known” of the abusive treatment of migrants in Tesla’s paint shop due to his “direct involvement in every aspect of the events at issue” and its records of the work performed, respectively).

116. Beltran, *supra* note 40, at 267.

satisfies knowledge or reckless disregard is relatively straightforward. Benefits are broadly interpreted as long as they are derived from the venture. Additionally, determining a recruiter's level of knowledge of or reckless disregard for the venture's engagement in forced labor is fact-specific. Courts, however, have not defined participation in a venture consistently, which ultimately creates uncertainty for prosecutors.

b. Drawbacks of the Knowingly Benefitting from Forced Labor Statute

Despite Congress's goal to address actors within the trafficking supply chain through enactment of § 1589(b), uncertainty around this provision arguably prevents prosecution of trafficker-recruiters. In particular, discrepancies in the definition of *participation in a venture* are problematic. In civil cases, courts define venture according to its definition under the sex trafficking statute. The only criminal case dealing with § 1589(b), however, pointed to facts demonstrating the defendant's direct involvement in obtaining the victims' forced labor.¹¹⁷ The Eastern District of New York's focus on the defendant's operational and managerial role appears to comport better with the Racketeer Influenced and Corrupt Organizations (RICO) Act definition, rather than the sex trafficking definition.¹¹⁸ If courts were to follow the higher standard established by the RICO Act definition in the criminal context, trafficker-recruiters may still remain outside a prosecutor's reach. A trafficker-recruiter could function within the overall forced labor scheme (associated in fact) but play no further role in managing the venture.

The *McTague* court requiring a violation of § 1589(a) to prove a violation of § 1589(b) further complicates the matter.¹¹⁹ This

117. *Rivera*, 2012 U.S. Dist. LEXIS 85090, at *18–19, *22; *United States v. McTague*, No. 5:14-CR-055, 2017 U.S. Dist. LEXIS 68598, at *16–17 (W.D. Va. Apr. 10, 2017) (prosecuting the employer who threatened victims to ensure their continued work).

118. *Rivera*, 2012 U.S. Dist. LEXIS 85090, at *18–19, *22 (finding that the defendant helped manage the victims' movements, operated the bars, and gave orders "like a boss"); see *supra* note 100.

119. See case cited *supra* note 108.

interpretation conflicts with other courts which seem to agree that a defendant need not commit forced labor to be guilty of knowingly benefitting from forced labor.¹²⁰ Nevertheless, no criminal cases have dealt with a situation where the defendant was not engaged in obtaining forced labor.¹²¹ The lack of case law combined with varying interpretations of participation in a venture creates uncertainty for prosecutors in determining whether they may have a viable case against a trafficker-recruiter. Perhaps, to the contrary, prosecutors expect that courts will require them to meet a higher standard to prove participation in a venture and, therefore, do not pursue cases against trafficker-recruiters.¹²²

3. *Fraud in Foreign Labor Trafficking*

a. *Interpreting the Elements*

Fraud in foreign labor contracting is a relatively new form of fraud to address unfair recruitment.¹²³ The Eighth Circuit, in *United States v. Bart*, broke the crime down into three key elements, finding “fraud in foreign labor contracting occurs when someone: (1) recruits, solicits, or hires a person outside the United States . . . ; (2) does so by

120. See *supra* note 110.

121. See cases cited *supra* note 117.

122. One prosecutor included a definition of participation in a venture in their criminal indictment. Zelaya-Mejia Indictment, *supra* note 55, at 2 (“The term ‘participation in a venture’ means knowingly assisting, supporting, or facilitating a violation of Title 18, United States Code, § 1589(a) (Forced Labor).”). The definition suggests a defendant must have engaged in obtaining forced labor. See CONG. RSCH. SERV., *supra* note 84, at 11–12.

123. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(e)(2), 122 Stat. 5044, 5044, 5071 (2008) (codified at 18 U.S.C. § 1351) (criminalizing fraud in foreign labor contracting in 2008). Carr commented that:

According to the Congressional Record, [§ 1351] 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. 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.

Carr, *supra* note 13, at 435. The statute also covers causing someone else “to recruit, solicit, or hire a person outside the United States” by fraudulent means or attempting to commit the crime. 18 U.S.C. § 1351.

means of materially false or fraudulent pretenses, representations or promises regarding that employment; and (3) acts knowingly and with intent to defraud.”¹²⁴ This court, however, provided little analysis and simply affirmed Bart’s conviction.¹²⁵

Other courts have followed this path by glossing over the elements entirely and merely pointing to an array of facts as sufficient.¹²⁶ The Eastern District of Michigan only briefly mentioned that “a reasonable jury could find [the emails in question] materially false or fraudulent.”¹²⁷ By comparison, in *Mohammed v. Sidecar Technologies, Inc.*, the District of Northern Illinois interpreted who could be victimized pursuant to the language “person ‘outside the United States.’”¹²⁸ The court concluded that, despite hiring immigrants unauthorized to work in the U.S., the claim for fraud in labor

124. 888 F.3d 374, 378 (8th Cir. 2018). *Bart* is the only criminal case interpreting the statute. In *United States v. Phan*, the court determined whether the trial evidence was sufficient to show the recruiter had a “fraudulent intent.” *United States v. Phan*, 772 F. App’x 512, 512 (9th Cir. 2019). Of the limited remaining cases that reached the courts, all deal with procedural issues. *E.g.*, *United States v. Kartan*, No. 2:16-cr-00217-MCE, 2021 U.S. Dist. LEXIS 9905, at *1–2 (E.D. Cal. Jan. 19, 2021) (deciding a motion for bail pending appeal, where a jury convicted the defendant of fraud in foreign labor contracting); *United States v. Yannai*, 791 F.3d 226, 230 (2d Cir. 2015) (deciding whether the defendant’s “right to be present at trial was violated by the district court’s refusals to adjourn the trial” while he was hospitalized). Civil cases are also limited because § 1351 itself has no private right of action. *Kemp v. Place Alliance LLC*, No. 6:22-cv-262-PGB-LHP, 2022 WL 3136895, at *3 (M.D. Fla. June 15, 2022) (citing *Smith v. Wilmington Sav. Fund Soc’y FSB ex rel. Stanwich Mortg. Loan, Tr.*, No. 3:18-CV-2065-G-BH, 2019 WL 2996571, at *12 (N.D. Tex. June 14, 2019)); see Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595) (establishing civil remedies for survivors of violations of only Title 18, Chapter 77). Any civil claims proceed as substantive offenses for RICO Act violations. *E.g.*, *Mohammed v. Sidecar Techs., Inc.*, No. 16 C 2538, 2016 U.S. Dist. LEXIS 156090, at *23–24 (N.D. Ill. Nov. 10, 2016).

125. *Bart*, 888 F.3d at 378 (relying on *Bart* “recruiting Dominican workers through false representations to the United States government with the intent to collect fraudulent kickbacks”). The only real value this decision provides is confirmation of the suspected fact-specific nature of this element (whether a representation is false). The court’s treatment in this case may be due, at least in part, to the prior plea agreements to fraud in foreign labor contracting by *Bart*’s coconspirators and to the statute being brought as a substantive offense to a conspiracy charge. *Id.*

126. *Kharb v. Ericsson, Inc.*, No. 4:17-CV-619, 2019 WL 1198399, at *8 (E.D. Tex. Mar. 14, 2019); *Castellanos v. Worldwide Distrib. Sys. USA, LLC*, 290 F. Supp. 3d 692, 699 (E.D. Mich. 2017); *Mohammed*, 2016 U.S. Dist. LEXIS 156090, at *23–24.

127. *Castellanos*, 290 F. Supp. 3d at 695, 699 (finding sufficient evidence to sustain a fraud in foreign labor contracting RICO Act claim where an IT staffing agency recruited and hired a Mexican citizen after promising him “a \$52,000 annual salary,” helped him obtain a U.S. visa, and required him to relocate, then told him “he would not be paid until his services were contracted to a third party,” but still expected him to report to the agency offices every day).

128. *Mohammed*, 2016 U.S. Dist. LEXIS 156090, at *23–24.

contracting should be dismissed because the company did not contact anyone outside of the U.S.¹²⁹ *Mohammed* indicates that foreign labor quite literally means foreign labor, even if the victims are foreigners residing in the U.S.

The shortage of case law may suggest the elements are straightforward, simply asking for proof the defendant committed the crime. Indeed, “materially false or fraudulent pretenses, representations, or promises,” and “intent to defraud” seemingly pose the biggest interpretation issues within the statute; however, what constitutes each is well-settled in the context of federal fraud claims.¹³⁰ Alternatively, the body of case law may affirm that prosecution of labor traffickers and others in the supply chain is insufficient, whether due to investigational barriers, prosecutorial discretion, or otherwise.

129. *Id.* (noting also the lack of “anything false or fraudulent” in the alleged actions).

130. KEVIN F. O’MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, 2A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 47:13 (6th ed. 2022) [hereinafter 2A O’MALLEY ET AL.] (quoting *United States v. Chanu*, 40 F.4th 528, 542 (7th Cir. 2022)); KEVIN F. O’MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 16:07, 16:11 (6th ed. 2022) [hereinafter 1A O’MALLEY ET AL.]; “Material statements are those that have a natural tendency to influence, or are capable of influencing, the decision of the [party] to which it was addressed.” 1A O’MALLEY ET AL., *supra*, at § 16:11 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). “To be ‘material’ it is not necessary that the statement or representation, in fact, influence or deceive.” *Id.* Furthermore, case law across the country defines “false or fraudulent pretenses, representations, or promises” as:

[A] statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term “false or fraudulent pretenses, representations, or promises” includes actual, direct false statements as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question and that were made or used with the intent to defraud.

2A O’MALLEY ET AL., *supra*. Finally, courts have defined “intent to defraud” as the intent to deceive, typically combined with “a purpose to bring about some gain or benefit to oneself or . . . to cause a loss to some person.” 1A O’MALLEY ET AL., *supra*, § 16:07. “Actual loss or injury need not be proven, only that the defendant ‘contemplated some actual harm or injury.’” *Id.* (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)).

b. Extraterritorial Application

Fraud in foreign labor contracting does not fall within the scope of 18 U.S.C. § 1596.¹³¹ Therefore, whether it applies extraterritorially must be determined. U.S. courts interpret statutes “to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary.”¹³² Section 1351 seems to rebut the presumption against extraterritoriality because the language appears to require foreign-directed conduct.¹³³ Aside from the title specifying *foreign* labor contracting, the statute can only be violated if someone “recruits, solicits, or hires a person *outside* the United States.”¹³⁴ Whether the courts eventually interpret this to mean the action occurs abroad or simply the potential employee must live abroad, the effect is the same: actions must be directed outside of the U.S. Therefore, extraterritorial application of § 1351 should be permissible.¹³⁵

Overall, a more in-depth evaluation of the relevant federal trafficking statutes sheds light on which statutes could provide liability for stand-alone recruiters. The labor trafficking statute (§ 1590)

131. See 18 U.S.C. §§ 1351, 1596.

132. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 404 (AM. L. INST. 2018); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 340 (2016) (“While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential.”); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (“Assuredly context can be consulted as well.”), *superseded on other grounds by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

133. Analysis of § 1351 mimics that performed by the Supreme Court. *RJR Nabisco, Inc.*, 579 U.S. at 338 (holding the RICO Act contains “a number of predicates that plainly apply to at least some foreign conduct”).

134. § 1351 (emphasis added).

135. One may argue that, in addition to placement of § 1351 within the fraud chapter of the U.S. Code instead of the TVPA, Congress did not intend to extend jurisdiction for § 1351 because it was not expressly included in § 1596, which was enacted in parallel. §§ 1351, 1596. Again, the express language of the statute indicates extraterritorial application. Furthermore, the statutes covered by § 1596 largely do not reference any specific conduct directed abroad, so an express provision for extraterritorial application was necessary. See § 1596; 18 U.S.C. § 1581 (making no express mention of any conduct outside the U.S.); 18 U.S.C. § 1583 (same); 18 U.S.C. § 1584 (suggesting U.S.-directed conduct by including “brings within the United States”); *id.* § 1589 (lacking a reference to where conduct must occur); 18 U.S.C. § 1590 (same). *But see* 18 U.S.C. § 1591 (mentioning actions occurring “in or affecting . . . foreign commerce” for only one of the violations). Additionally, one may argue the subtitle, “Work inside the United States,” focuses the statute on activities occurring domestically, but “focus is considered only when it is necessary to proceed to the inquiry’s second step.” § 1351; *RJR Nabisco, Inc.*, 579 U.S. at 327.

requires stand-alone recruiters to have engaged in the forced labor, which is beyond the scope of both the trafficker-recruiter's and independent recruiter's role of simply obtaining migrant workers for an employer. Furthermore, various court interpretations of the *knowingly benefitting from forced labor* statute (§ 1589(b)) create uncertainty as to whether stand-alone recruiters could be effectively prosecuted under the statute. Courts may require the recruiter to obtain a migrant's forced labor, resulting in the same exclusion of stand-alone recruiters as the labor trafficking statute. Therefore, the seemingly most straightforward option for holding stand-alone recruiters accountable under the TVPA is the federal *fraud in foreign labor contracting* statute (§ 1351). The high level of intent required, however, would likely limit prosecution of independent recruiters. As such, an avenue of criminal liability for this class of stand-alone recruiter has to be found elsewhere.

B. State Prohibitions on Employment Agency Deception

Twenty-eight state legislatures across the country have generally condemned and prohibited fraudulent practices engaged in by stand-alone recruiters.¹³⁶ Eight of these states, plus three others, prohibit the use of misrepresentations when recruiting for a specific industry, such as agriculture or construction, or in a specific context, such as recruiting migrant laborers.¹³⁷ Conversely, instead of prohibiting misrepresentations, one state requires recruiters to “reasonably ensure” all representations are true and that all material

136. *See supra* Section I.C; *see infra* Appendix. No case law exists to provide guidance for interpreting the requisite elements. As such, this Note will rely on standard canons of statutory construction when interpreting the state laws.

137. *See infra* Appendix. This Note does not contemplate athlete agents, despite relevant statutes in some states, because these agents enter into contract with student athletes and act as the students' representatives in a wider-ranging capacity than merely recruitment and placement with an employer. *E.g.*, N.M. STAT. ANN. § 61-14F-14 (West, Westlaw through 2023 1st Reg. Sess. of 56th Leg. (2023)); *see Athlete Agents Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=cef8ae71-2f7b-4404-9af5-309bb70e861e> [<https://perma.cc/9TN5-7B99>] (Aug. 7, 2023, 9:03 PM) (choose “Map” or “Summary”).

facts are disclosed.¹³⁸ The remaining eighteen states do not currently address stand-alone recruiters in any context.¹³⁹

In terms of jurisdiction over migrant recruitment, the federal presumption against extraterritoriality does not automatically apply to state law.¹⁴⁰ Ten of the twenty-eight states with a general prohibition have chosen to accept the presumption (with variation in its application), while eleven states have rejected the presumption in favor of determining a statute's geographic scope.¹⁴¹ The remaining seven states have not addressed the presumption in recent years, although some of the lower courts have also focused on the statute's geographic scope.¹⁴² Of the twenty-eight states with a general prohibition, only three mention any international conduct or recruitment services.¹⁴³ In

138. ARIZ. REV. STAT. ANN. § 41-191.10(A) (Westlaw through 1st Reg. Sess. of 56th Leg. (2023)).

139. *See infra* Appendix. The District of Columbia, Indiana, Michigan, and Nebraska repealed their statutes prohibiting an employment agency from making false notices or advertisements. D.C. CODE ANN. §§ 47-3001 to -3009 (West, repealed 1985); IND. CODE ANN. § 25-16-1-16 (West, repealed 2023); IND. CODE ANN. § 25-16-1-16 (West, effective to June 30, 2023); MICH. COMP. LAWS ANN. § 339.1017 (West, repealed 1992); Editor's and Reviser's Notes, MICH. COMP. LAWS ANN. § 339.1017 (West); NEB. REV. STAT. ANN. § 48-512 (West, repealed 2020); NEB. REV. STAT. ANN. § 48-512 (West, effective to July 24, 2020). In the states without a prohibition on misrepresentations, other statutes, such as the general fraud statute, would need to form the basis of action. *See, e.g.*, ALA. CODE § 6-5-101 (West, Westlaw through Act 2023-3 of 2023 1st Spec. Sess.); GA. CODE ANN. § 23-2-52 (West, Westlaw through 2023 Reg. Sess. of Ga. Gen. Assemb.). State labor trafficking laws also exist in all fifty states, with some encompassing a larger range of actions than those seen at the federal level, such as recruitment by deception. *E.g.*, WASH. REV. CODE ANN. § 19.320.010(5) (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.).

140. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1391 (2020).

141. *See id.* at 1403–04 tbl.1.

142. *Id.* at 1403–04 tbl.1, 1418–19.

143. MD. CODE ANN., BUS. REG. § 9-101(c)(1)(iv) (West, Westlaw through 2023 Reg. Sess. of Gen. Assemb.) (including within the definition of employment agency anyone who “participates directly or indirectly in the recruitment or supply of an individual who resides *outside of the continental United States* for employment in the continental United States”) (emphasis added); N.Y. GEN. BUS. LAW § 171(2)(b) (McKinney, Westlaw through L.2023, chs. 1 to 191) (“‘Employment agency’ shall include any person engaged *in the practice of law* who regularly and as part of a pattern of conduct, directly or indirectly, recruits, supplies, or attempts or offers to recruit or supply, an employee who resides outside the continental United States . . . for employment in this state . . .” (emphasis added)); TEX. OCC. CODE ANN. § 2501.001(9)(c) (West, Westlaw through 2023 Reg. Sess. of 88th Leg.) (including overseas placement services as a personnel service). Statutes pertaining to migrant laborers, or even other laborers where the legislature acknowledged the prevalence of migrant workers, arguably apply extraterritorially

the remaining twenty-five states, any misrepresentations must have occurred in the state.¹⁴⁴

1. *Prohibited Actions*

Of the twenty-eight state statutes that have a general prohibition, twenty-five follow two general formulations: An employment agency shall not “[p]ublish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement” or “make any false or misleading promise or representation or give any false or misleading information to any applicant.”¹⁴⁵ Twelve of these states include both formulations in their statutory provision, while eleven prohibit only the former actions, and two prohibit only the latter

as well. *E.g.*, FLA. STAT. ANN. § 450.28(1)(a) (West, Westlaw through June 16, 2023, in effect from 2023 Spec. B Sess. and 2023 1st Reg. Sess.) (defining farm labor contractor as anyone who recruits or “transports *into* or within the state” at least one farm worker (emphasis added)); WIS. STAT. ANN. § 103.90(5)(a) (West, Westlaw through 2023 Act 10) (defining migrant worker as “any person who temporarily leaves a principal place of residence *outside* of this state and comes to this state” (emphasis added)).

144. The territorial effects doctrine may allow for misrepresentations to occur outside the state where the effect within the state is substantial, but disagreement exists as to whether this doctrine falls within territorial or extraterritorial jurisdiction. *Compare* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (“The territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction.”), with J. Troy Lavers, *Extraterritorial Offenses and International Law: The Argument for the Use of Comity in Jurisdictional Claims*, 14 SW. J.L. & TRADE AMERICAS 1, 6 n.30 (2007) (“The effects doctrine justifies jurisdiction of an extraterritorial act based on the effects it produces within the state, which is distinct from the objective territorial principle where jurisdiction is based on certain element(s) of the offense being completed in the territory.”), and Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 472 n.163 (2012) (listing congressional intent for extraterritorial application as one of the elements to satisfy territorial effects doctrine).

145. N.C. GEN. STAT. ANN. § 95-47.6(2), (9) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.). In many cases, the actual text differs from state to state. *See* statutes cited *infra* Appendix. New Jersey’s statute appears to have limited application. It states an employment agency shall not “[f]alsely state or imply to a job seeker that [they are] seeking to obtain individuals to perform services, tasks or labor for which salary, wages, or other compensation is to be paid.” N.J. STAT. ANN. § 34:8-52(g) (West, Westlaw through L.2023, c. 64, and J.R. No. 10). Washington has a separate statute criminalizing fraud by employment agents, which will not be considered due to the high *mens rea* requirement of an intent to influence. WASH. REV. CODE ANN. § 49.44.050 (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.).

actions.¹⁴⁶ Each formulation appears to generally prohibit the sharing of false information through some vehicle (verbal or written).¹⁴⁷

In regard to the first formulation, the definition of publish as “[t]o distribute copies (of a work) to the public” indicates the requirement of a written work.¹⁴⁸ Inclusion of notice or advertisement further indicates this interpretation because common notions of each, in the context of employment, relate to a written format. Some statutes have even specified notice “by means of . . . publication[,]” which expressly reinforces the interpretation that a writing is required.¹⁴⁹ Further, modern understandings of what and how information is published suggest written information may be published in print or online.¹⁵⁰ In contrast, the second formulation likely refers to, at a minimum, verbally transmitted information. No specific context is associated with making representations or giving information. Where statutes contain both formulations, the contrast affirms the allowance for verbal information because requiring a writing again would be redundant. In the two states with statutes containing only the second formulation, nothing in the statute indicates the need for a writing.¹⁵¹ This does not mean a writing would be insufficient—it simply is not necessary.

Finally, two state statutes provide an extremely simplistic prohibition on misrepresentations: “A person . . . shall not make any

146. *See infra* Appendix.

147. Some states further specify the types of information that should not be misrepresented, generally encompassing “the character of the prospective job, length of employment, hours or salary.” CONN. GEN. STAT. ANN. § 31-131a(h) (West, Westlaw through 2023 Reg. Sess.); *see also, e.g.*, N.C. GEN. STAT. ANN. § 95-47.6(9) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.); W. VA. CODE ANN. § 21-2-6 (West, Westlaw through 2023 Reg. Sess.); WIS. STAT. ANN. § 105.02 (West, Westlaw through 2023 Act 10).

148. *Publish*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also Publish*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/publish> [<https://perma.cc/C2V2-4WKD>].

149. ARK. CODE ANN. § 11-11-224(a) (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.); 225 ILL. COMP. STAT. ANN. 515/10 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.).

150. With the growth in technology, a large number of resources are “published” online in a digital format. Additionally, recruitment practices now include the use of social media, email, and websites. *See infra* note 183.

151. *See* TEX. OCC. CODE ANN. § 2501.101(a)(2) (West, Westlaw through 2023 Reg. Sess. of 88th Leg.); UTAH CODE ANN. § 34-29-15(1)(a) (West, Westlaw through 2023 Gen. Sess.) (including “misstatement[s],” which carries a verbal connotation).

false statement to any person . . . seeking employment”¹⁵² “Statement” carries both a verbal and written connotation.¹⁵³ Therefore, these statutes appear to broadly encompass all actions specified in the first two formulations.

2. Mens Rea

Fourteen of the twenty-eight states with a general prohibition specify some kind of *mens rea* requirement. Twelve require knowledge, as applied to at least one of the actions required.¹⁵⁴ The defendant must have known the information they provided, in whatever form, was false.¹⁵⁵ The other two states expressly requiring

152. WIS. STAT. ANN. § 105.02 (West, Westlaw through 2023 Act 10); *accord* W. VA. CODE ANN. § 21-2-6 (West, Westlaw through 2023 Reg. Sess.).

153. Statement is defined as “the act or process of stating or presenting *orally or on paper*.” *Statement*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/statement> [<https://perma.cc/44W5-B6N5>] (emphasis added).

154. *See infra* Appendix.

155. West Virginia’s statute expressly states this premise in its text: “No employment agent or any employee or agent thereof, shall make any false statement to any person seeking employment *knowing the same to be false . . .*” W. VA. CODE ANN. § 21-2-6 (West, Westlaw through 2023 Reg. Sess.) (emphasis added). Six states define “knowingly” according to the definition in the Model Penal Code. COLO. REV. STAT. ANN. § 18-1-501(6) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb. (2023)); CONN. GEN. STAT. ANN. § 53a-3(12) (West, Westlaw through 2023 Reg. Sess.), *amended in part by* 2023 Conn. Legis. Serv. P.A. 23-53 (H.B. 6667) (West) (effective Oct. 1, 2023); 720 ILL. COMP. STAT. ANN. 5/4-5 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.); TENN. CODE ANN. § 39-11-106(23) (West, Westlaw through 2023 Reg. Sess. of 113th Tenn. Gen. Assemb.); OR. STATE BAR, OREGON UNIFORM CRIMINAL JURY INSTRUCTIONS NO. 1036 (2020); *State v. Wyatt*, 482 S.E.2d 147, 153 (W. Va. 1996); *see* MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST., Proposed Official Draft 1962) (“A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist . . .”). As such, constructive knowledge is insufficient unless the recruiter thought there was a high probability the information was false. MODEL PENAL CODE § 2.02(7) (AM. L. INST., Proposed Official Draft 1962); *see* Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 197 (2003) (pointing to the Model Penal Code’s aversion to constructive mental states); *see* Beltran, *supra* note 40, at 265. Although worded differently, four states’ definitions similarly indicate the need for actual knowledge. N.D. CENT. CODE ANN. § 12.1-02-02(1)(b) (West, Westlaw through 2023 Reg. Sess.) (defining knowledge as requiring at least a “firm belief”); OKLA. STAT. ANN. tit. 21, § 96 (West, Westlaw through 1st Reg. Sess. of 59th Leg. and the 1st Extraordinary Sess. of 59th Leg. (2023)) (requiring “only a knowledge that the facts exist”); STEPHEN E. FORESTELL, 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES—CRIMINAL, CRIMJIG 3.32 (6th ed. 2022) (same); *State v. Stephenson*, 10 S.E.2d 819, 823 (N.C. 1940) (“The word

a *mens rea* also provide clarity but prohibit the publishing or giving of false information that the employment agency “knows or reasonably should have known is false, fraudulent, or misleading.”¹⁵⁶ The employment agency need not have actual knowledge that its information is false; constructive knowledge is sufficient.¹⁵⁷

The other fourteen states appear to omit a *mens rea* requirement completely, and five of the states—which have a knowledge requirement for either written or verbal misrepresentations—appear to have no *mens rea* requirement for the other type of misrepresentation prohibited by the statute.¹⁵⁸ Given the presumption in favor of a *mens rea* requirement in criminal cases, the surrounding provisions will be considered.¹⁵⁹ Fourteen states require *mens rea* for actions within the same section or chapter.¹⁶⁰ Alaska’s and Texas’s statutes mention a

‘knowingly[.]’ as so used, means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged.”). Washington and South Carolina, however, define knowingly in a manner that expressly provides for constructive knowledge. WASH. REV. CODE ANN. § 9A.08.010(1)(b) (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.); *State v. Thompkins*, 211 S.E.2d 549, 554 (S.C. 1975) (“The term *knowingly* is defined as including, not only actual knowledge of the contents of the subject matter of the material, but also knowledge of its contents which could have been gained by reasonable inspection, when the circumstances are such as would have put a reasonable man on inquiry.”).

156. LA. STAT. ANN. § 23:111(C)(4) (Westlaw through 2023 1st Extraordinary Sess.); *see also* ARK. CODE ANN. § 11-11-224(f) (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.) (applying the *mens rea* to verbal misrepresentations).

157. *See* Beltran, *supra* note 40, at 265.

158. *See e.g.*, N.Y. GEN. BUS. LAW § 187(2) (McKinney, Westlaw through L.2023, chs. 1 to 191) (stating that “[a]n employment agency shall not . . . [p]ublish or cause to be published any false, fraudulent or misleading information, representation, promise, notice or advertisement”). *Compare* N.C. GEN. STAT. ANN. § 95-47.6(2) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.) (stating that an employment agency shall not “[p]ublish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement”), *with* N.C. GEN. STAT. ANN. § 95-47.6(9) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.) (stating that an employment agency shall not “[k]nowingly make any false or misleading promise or representation or give any false or misleading information”).

159. *See* CONG. RSCH. SERV., *supra* note 84, at 34.

160. ARK. CODE ANN. § 11-11-224(f) (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.); CAL. CIV. CODE § 1812.507 (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.); CONN. GEN. STAT. ANN. § 31-131a(h) (West, Westlaw through 2023 Reg. Sess.); HAW. REV. STAT. ANN. § 373-11(3) (West, Westlaw through Act 102 of 2023 Reg. Sess.); 225 ILL. COMP. STAT. ANN. 515/10 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.); MD. CODE ANN., BUS. REG. § 9-302(1) (West, Westlaw through 2023 Reg. Sess. of Gen.

requisite *mens rea* in the penalty section instead.¹⁶¹ Each provides for a higher penalty where the employment agency acted “willfully” or “knowingly.”¹⁶² Such mention of *mens rea* elsewhere indicates a state’s legislature intended to apply strict liability to the provisions in question. Nevertheless, eleven of these statutes include “fraudulent” or “misleading” representations.¹⁶³ A fraudulent misrepresentation is a “false statement that is known to be false or is made recklessly,” and mislead means “[t]o cause (another person) to believe something that is not so.”¹⁶⁴ Therefore, although context may imply strict liability, the language in the text suggests something more than strict liability may be required.¹⁶⁵

Assemb.); MASS. GEN. LAWS ANN. ch. 140, § 46K(4) (West, Westlaw through ch. 6 of 2023 1st Annual Sess.); NEV. REV. STAT. ANN. § 611.290 (West, Westlaw through 82d Reg. Sess. (2023)); N.J. STAT. ANN. § 34:8-46(h)(3) (West, Westlaw through L.2023, c. 64, and J.R. No. 10); N.Y. GEN. BUS. LAW § 187(5) (McKinney, Westlaw through L.2023, chs. 1 to 191); N.C. GEN. STAT. ANN. § 95-47.6(9) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.); TENN. CODE ANN. § 47-18-1703(11) (West, Westlaw through 2023 Reg. Sess. of 113th Tenn. Gen. Assemb.); TEX. OCC. CODE ANN. § 2501.101(a)(9) (West, Westlaw through 2023 Reg. Sess. of 88th Leg.); UTAH CODE ANN. § 34-29-15(1)(c) (West, Westlaw through 2023 Gen. Sess.).

161. ALASKA STAT. ANN. § 23.15.510 (West, Westlaw through ch. 12, of 2023 1st Reg. Sess. of the 33d Leg.); TEX. OCC. CODE ANN. § 2501.251 (West, Westlaw through 2023 Reg. Sess. of 88th Leg.).

162. See *supra* note 161 and accompanying text.

163. ALASKA STAT. ANN. § 23.15.490(7) (West, Westlaw through ch. 12, of 2023 1st Reg. Sess. of the 33d Leg.); CAL. CIV. CODE § 1812.508(b)(1) (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.); HAW. REV. STAT. ANN. § 373-11(1) (West, Westlaw through Act 102 of 2023 Reg. Sess.); KAN. STAT. ANN. § 44-408 (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.); MD. CODE ANN., BUS. REG § 9-302(8) (West, Westlaw through 2023 Reg. Sess. of Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 140, § 46K(1) (West, Westlaw through ch. 6 of 2023 1st Annual Sess.); N.Y. GEN. BUS. LAW § 187(2) (McKinney, Westlaw through L.2023, chs. 1 to 191); N.C. GEN. STAT. ANN. § 95-47.6(2) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.); 53 PA. STAT. AND CONS. STAT. § 4551 (West, Westlaw through 2023 Reg. Sess. Act 5); TEX. OCC. CODE ANN. § 2501.101(a)(2) (West, Westlaw through 2023 Reg. Sess. of 88th Leg.); WYO. STAT. ANN. § 27-8-107 (West, Westlaw through 2023 Gen. Sess. of Wyo. Leg.). New Jersey and Wisconsin make no mention of anything other than “false” information. N.J. STAT. ANN. § 34:8-52(g) (West, Westlaw through L.2023, c. 64, and J.R. No. 10); WIS. STAT. ANN. § 105.02 (West, Westlaw through 2023 Act 10). Utah substitutes misstatement for misleading, bolstering the argument that the statute follows a strict liability standard. UTAH CODE ANN. § 34-29-15(1)(a) (West, Westlaw through 2023 Gen. Sess.). Although a misstatement may be purposeful, the general connotation indicates an accident. *Misstatement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

164. *Misrepresentation*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Mislead*, BLACK’S LAW DICTIONARY (11th ed. 2019) (clarifying that “[a]lthough the misleading may be inadvertent, the term usu[ally] implies willful deceit”).

165. See CONG. RSCH. SERV., *supra* note 84, at 11–13 (discussing how the association of words, indicating a similar meaning, should factor into interpretation). In state statutes that do not reference these terms, the standard likely is strict liability given the direct and surrounding textual evidence.

Overall, twelve states prohibit both verbal and written misrepresentations, eleven states prohibit only written misrepresentations, and two states prohibit verbal misrepresentations. In states where the statute's text only specifies a verbal communication, written communication would also be sufficient. Fourteen state prohibitions require the recruiter to have acted with some form of knowledge as to the information's falsity, while the nineteen remaining prohibitions seem to maintain strict liability. Of these nineteen prohibitions, however, most contain language, such as "fraudulent," that may lead a court to interpret the statute as requiring more than strict liability. Finally, eleven states have additional recruitment-based statutes, which criminalize the same actions as the general statutes but as applied in specific contexts. One state creates a duty to provide all material information regarding employment. Eighteen states do not have a statute that addresses misrepresentations generally or in a specific context.

III. PROPOSAL

Stand-alone recruiters who engage in unethical recruitment, whether intentional or not, are still largely left unaccountable. The *federal labor trafficking* statute, and possibly the *knowingly benefitting from forced labor* statute, requires a stand-alone recruiter to have obtained a migrant's forced labor.¹⁶⁶ Because stand-alone recruiters are not directly engaging in the coercive behaviors defined under § 1589(a), they can escape liability. The federal *fraud in foreign labor contracting* statute, however, may provide an option for prosecuting stand-alone recruiters. Yet, the statute only covers those recruiters with an intent to defraud migrant workers. Independent recruiters, who are presumably not trying to deceive the workers and may not be aware of—let alone contemplate—the harm the workers will suffer at the hands of the employer, still remain unaddressed.¹⁶⁷ Furthermore,

166. *See supra* Section II.A.

167. *See supra* note 130.

federal prosecutors have pursued charges for fraud in foreign labor contracting in less than twenty cases since the statute's enactment almost fifteen years ago.¹⁶⁸ Only two of these cases involved a stand-alone trafficker-recruiter.¹⁶⁹

As such, finding effective avenues for prosecuting stand-alone recruiters is paramount.¹⁷⁰ Heightened focus on fraud in foreign labor contracting may help eliminate the gap in prosecution of trafficker-recruiters, but state employment agency statutes provide a better option for all-encompassing accountability due, in part, to the lowered *mens rea* requirements. Nevertheless, the state statutes face limitations due to the lack of uniformity across the fifty states and the minimal penalties. This Note proposes a model state statute as a guide to address stand-alone recruiters more effectively. The model statute seeks to merge the benefits of the federal and state statutes while simultaneously reducing their limitations.

A. Increased Prosecution of Stand-Alone Recruiters is Important

Although the “U.S. criminal justice system is so deeply afflicted with serious and systemic problems,” increased prosecution of stand-alone recruiters has the potential to benefit a number of public and private actors.¹⁷¹ Investigators and prosecutors alike may benefit from an expansion of case law and an ability to better evaluate

168. See cases cited *supra* note 55.

169. Cabrera Indictment, *supra* note 12, at 5, 13; Rahman Indictment, *supra* note 8, at 1–2, 5. The shortage of cases may suggest recruiters are also usually engaged in obtaining a victim's forced labor alongside the employer. Research, however, demonstrates the known involvement of stand-alone recruiters. See sources cited *supra* note 14.

170. Other avenues for prosecution exist that are beyond the scope of this Note. At the federal level, prosecution against traffickers may be pursued under the mail or wire fraud statutes, or for immigration-related offenses. *E.g.*, Askarkhodjaev Indictment, *supra* note 55, at 2–5 (charging the alleged traffickers with harboring illegal aliens, visa fraud, mail fraud, transportation of illegal aliens, and wire fraud). “Each state has now passed human trafficking legislation,” but the existence of a trafficking statute does not mean the state has addressed all actors within the supply chain. Smith, *supra* note 59, at 544; *see, e.g.*, IOWA CODE ANN. § 710A.1 (West, Westlaw through 2023 Reg. Sess.) (defining human trafficking and forced labor in a similar manner to federal law). Within the context of employment agencies, state law also often limits the use of fees in recruiting applicants or requires agency licensing. *See generally*, *e.g.*, N.Y. GEN. BUS. LAW §§ 172, 185 (McKinney, Westlaw through L.2023, chs. 1 to 191).

171. Smith, *supra* note 59, at 526–27.

trafficking trends in the U.S.¹⁷² A growth in labor trafficking cases would diminish “the harmful myth that all human trafficking is sex trafficking,” at least from a government perspective.¹⁷³ Such increased awareness of labor trafficking could redirect more resources to prosecuting labor trafficking, which may then further increase awareness.¹⁷⁴ Heightened accountability for recruiters would also demonstrate the U.S.’s stance on the seriousness of the crime to the rest of the world and could provide restorative justice—in the form of restitution and peace of mind—to survivors.¹⁷⁵

Finally, an increase in the prosecution of recruiters may have a beneficial deterrent effect on traffickers and against workplace exploitation generally.¹⁷⁶ Research demonstrates that traffickers often

172. *See id.* at 527.

173. *Id.* at 504, 528.

174. *Id.* at 528.

175. *Id.* at 527. Despite the international and domestic obligation to address trafficking in persons, many question the credibility of the U.S.’s stance on the gravity of trafficking due, in part, to under-prosecution of trafficking. *E.g.*, Christine Murray, *U.S. Criticized Over Top Anti-Trafficking Ranking Despite Failings*, REUTERS, <https://www.reuters.com/article/us-usa-humantrafficking-trfn/u-s-criticized-over-top-anti-trafficking-ranking-despite-failings-idUSKBN2402XE> [<https://perma.cc/P3L5-GCNN>] (June 29, 2020, 5:19 PM) (“The United States has undermined its credibility in the global drive to end human trafficking by giving itself top marks in its annual report on the crime despite dwindling prosecutions and protection for foreign victims . . .”); *see supra* notes 23, 36 and accompanying text. In terms of restitution, Martina E. Vandenberg notes:

Prosecutions can provide a mechanism for trafficking victims to rebuild their lives. Financial compensation obtained through criminal prosecution can catapult a trafficking victim forward on the path to survival. It can preempt the need for civil litigation. It can restore dignity to a trafficking victim unable to support [their] family. It can provide the financial wherewithal for a trafficking victim to thrive, not just survive. Funds obtained through restitution orders may be used to go to college, to buy a home, to purchase a car, to support family members at home. Prosecution with restitution takes a step beyond punishment and retribution.

Prosecution can be a form of restorative justice, returning through restitution the value of the labour stolen from trafficking victims. Victim-centred [] prosecution can holistically address the harms perpetrated by the traffickers. And in the US, advocates for trafficking victims have seen the transformative power of restitution. Long prison sentences are not enough.

Martina E. Vandenberg, *Palermo’s Promise: Victims’ Rights and Human Trafficking*, ANTI-TRAFFICKING REV. (2016),

<https://www.antitraffickingreview.org/index.php/atjournal/article/download/180/183?inline=1> [<https://perma.cc/U8QT-A79K>].

176. Smith, *supra* note 59, at 527–28.

act due to a lack of accountability, and therefore a lack of deterrence.¹⁷⁷ An increase in the prosecution of trafficker-recruiters may subsequently deter such involvement because they would then face the risk of punishment. Similarly, prosecuting independent recruiters would likely create an incentive to perform due diligence.¹⁷⁸ Verifying an employment opportunity before seeking applicants takes extra time and resources. Even though the associated costs could be shifted to the employer, independent recruiters may not see a need to take such actions without government regulation. By simply using a regulatory scheme to maintain accountability, independent recruiters may be better motivated to make a good faith effort to ensure they work alongside ethical employers. Furthermore, such increased accountability of independent recruiters could indirectly affect the U.S. workforce as a whole by reducing the normalization of workplace exploitation.¹⁷⁹ As such, whether under federal or state law, holding stand-alone recruiters accountable is important.

B. Comparing the Federal Fraud in Foreign Labor Contracting Statute to State Employment Agency Law

The federal *fraud in foreign labor contracting* and state employment agency statutes differ in a number of ways, despite addressing the same

177. *Why Trafficking*, HUM. TRAFFICKING INST., <https://traffickinginstitute.org/why-trafficking/> [https://perma.cc/QK5N-H2J5] (“Each trafficker stopped sends a message to other traffickers that their crime is not worth the risk, initiating a ripple effect of deterrence.”); Hannah Gould, *What Fuels Human Trafficking*, UNICEF USA (Jan. 13, 2017), <https://www.unicefusa.org/stories/what-fuels-human-trafficking/31692> [https://perma.cc/Y74Q-WFW4] (“[H]uman trafficking is fueled by a high reward, low risk dynamic. This means that traffickers can expect to make a lot of money with minimal fear of punishment or legal consequence.”).

178. Although the United Nations encourages businesses to perform due diligence to ensure their operations do not cause or contribute to human rights violations, the guidance is not binding law. U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK 14–17 (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/G7E5-KYMV]. Mandating increased transparency in business operations may provide another avenue for regulating independent recruiters. Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIR. 80, 81 (2012). Nevertheless, transparency does not equate to a duty to verify employment opportunities.

179. Smith, *supra* note 59, at 528; Carr, *supra* note 13, at 410 (“As wages and working conditions decline for guest workers, they decline for domestic workers as well.”).

issue—misrepresentations in the employment context. As such, each has distinct benefits and limitations regarding the scope of applicability, enforcement mechanisms, and penalties for violations.

1. Applicability to All Stand-Alone Recruiters

Where adequate focus and resources can be directed towards prosecuting labor trafficking, the *fraud in foreign labor contracting* statute will likely prove to be extremely beneficial.¹⁸⁰ Heightened awareness of this crime may also help supplement cases where other trafficking-related statutes provide too high of a standard or are generally inapplicable.¹⁸¹ Additionally, the elements of fraud in foreign labor contracting are well-understood, which provides an incentive to prosecutors to pursue these cases.¹⁸² The main drawback to relying exclusively on this statute is its inapplicability to independent recruiters. Unlike trafficker-recruiters, independent recruiters are unlikely to observe any illegal activity, much less have the required intent to defraud.

By comparison, state statutes prohibiting misrepresentations in the employment context appear to be an effective method for holding all types of stand-alone recruiters accountable. In terms of the specific actions prohibited, over half of the existing general statutes (eighteen of twenty-eight) could address all common recruitment methods, such

180. A lack of attention and resources are not the only factors affecting under-prosecution. See *infra* note 211.

181. Compared to labor trafficking or knowingly benefitting from forced labor, the elements of fraud in foreign labor contracting would be relatively easy to prove in a case against a trafficker-recruiter. A trafficker-recruiter likely has the intent to defraud, or intent to deceive, the migrant. At the minimum, by nature of being involved in the labor trafficking scheme, the trafficker-recruiter assumedly has knowledge that their representations are false and will lead to the migrant being harmed. The trafficker-recruiter is also likely acting for the purpose of their own financial gain, especially given the common practice of charging exorbitant recruitment fees. Furthermore, those false representations would go to a material fact because a reasonable person would find wages, working hours, immigration status, living arrangements, and working conditions important to their decision to accept employment.

182. See *supra* note 131 and accompanying text. The *Mohammed* court's decision to restrict recruitment to persons still outside of the U.S. poses the biggest limitation on prosecuting trafficker-recruiters pursuant to this statute. *Mohammed v. Sidecar Techs., Inc.*, No. 16 C 2538, 2016 U.S. Dist. LEXIS 156090, at *23–24 (N.D. Ill. Nov. 10, 2016). Recruitment of migrants before they have entered the U.S., however, is the primary focus of this Note.

as online and newspaper advertising and word of mouth.¹⁸³ Those statutes that cover only published information would also apply due to the prevalence of online job advertising.¹⁸⁴ Moreover, the lack of extraterritorial application for state statutes initially appears to create an issue, but likely has little effect. Because recruiters use online methods most frequently, stand-alone recruiters often perform the relevant conduct in the state.¹⁸⁵ As such, whether a statute expressly provides for extraterritorial application is not dispositive. In instances where a recruiter travels abroad, however, prosecution could only proceed under the state statutes that allow for extraterritorial application.

In terms of *mens rea*, strict liability statutes would enable prosecution of independent recruiters and trafficker-recruiters. Fourteen of the existing statutes, however, require knowledge that the representation was false, with only four of those states expressly allowing for constructive knowledge. Therefore, similar to the *fraud in foreign labor contracting* statute, independent recruiters would go unaddressed in these states because they are unlikely to have actual knowledge that the information is false. Even with constructive knowledge, a reasonable person must have seen the need for the independent recruiter to investigate the employment opportunity further. In certain conditions, such as where the position is supposed to be paid at least minimum wage, a reasonable person may see no issue with the job. Therefore, the independent recruiter may still escape liability where some investigation on the recruiter's part—instead of taking the trafficker employer at his or her word—may have revealed that the provided information was false.

183. Bracy et al., *supra* note 14, at 43 (listing staffing agencies, online job advertisements, email, smartphone technology, Backpage.com, face-to-face recruitment, and local newspaper advertisements as the means for accessing and recruiting potential labor trafficking victims); Indeed Editorial Team, *How Do Staffing Agencies Work?*, INDEED, <https://www.indeed.com/career-advice/finding-a-job/how-do-staffing-agencies-work> [<https://perma.cc/G6G2-TTWS>] (Feb. 16, 2023) (“[An] agency composes a job description and advertises it on its website or other job boards. Recruiters might also use social media or other professional networks.”).

184. Bracy et al., *supra* note 14, at 43.

185. *See supra* notes 183–84 and accompanying text.

Despite applying to individuals as well as organizations, the definition of employment agency may also limit these statutes' applicability.¹⁸⁶ Although exclusions within the definition may serve a functional role in limiting regulation to certain industries or individuals, they may create a problem in holding stand-alone recruiters accountable. Where a trafficker-recruiter is aware of the specific exclusions, they may claim a nonemployment agency status. On the other hand, a trafficker-recruiter and their associates may set up a scheme to receive fees from migrants but give the appearance that the employer is paying the fee.¹⁸⁷ As for independent recruiters, receipt of fees from the employer excludes them as an employment agency in a number of states, which is problematic. Imagine a scenario where, as recruiters expect, a trafficker-employer pays the independent recruiter a fee to obtain migrant workers on his farm.¹⁸⁸ The independent recruiter uses, albeit unknowingly, false information provided to entice the migrant workers to move to and work on the farm. The trafficker-employer then exploits the migrant workers, including shifting the cost of the recruitment fee onto the migrant workers after the recruiter is no longer involved. Therefore, the independent recruiter has recruited migrants and supported the labor trafficking scheme but is not liable in states requiring the fee to be paid directly to the recruiter by a non-employer, even under a strict liability standard.

2. *Investigative and Enforcement Mechanism*

Another benefit to prosecuting under existing state laws (as opposed to the federal *fraud in foreign labor contracting* statute) is seen in the different agencies involved. In many states, investigation and enforcement of the employment agency statute lies with the state

186. See *supra* note 77 and accompanying text.

187. Many states require a recruiter to solicit a fee to count as an employment agency. *E.g.*, N.Y. GEN. BUS. LAW § 171(2)(a) (McKinney, Westlaw through L.2023, chs. 1 to 191). Trafficker-recruiters could also hide the fact that a fee was paid at all.

188. See Indeed Editorial Team, *supra* note 183 (“The employer is paying the fees to the agency. No staffing agency should charge an employee.”).

department of labor.¹⁸⁹ Compared to the Department of Justice, Department of State, and Department of Homeland Security at the federal level, a state department of labor has more hands-on experience with the local business community. “Although agencies that enforce labor and employment laws lack sufficient resources to carry out their existing enforcement obligations, they already have experience engaging with workers, have more ready access to workplaces, and have an understanding of workplace dynamics and investigations superior to that of traditional law enforcement agencies.”¹⁹⁰ Even other state agencies may know more about local issues and trends in employment because they operate with a narrower focus than the federal agencies. Therefore, in this respect, the state statutes may be more beneficial than the federal *fraud in foreign labor contracting* statute.

3. *An Assessment of Penalties*

Despite its limited applicability, prosecuting trafficker-recruiters for fraud in labor contracting is potentially more beneficial than prosecuting under existing state statutes.¹⁹¹ The penalties at the state level are much lower, with the average maximum prison sentence being one year and the average maximum fine being no more than \$1,000. Compared to a maximum prison sentence of five years upon conviction of fraud in foreign labor contracting under federal law, the state penalties are minimal and would likely have little deterrent effect. The discrepancy becomes even more prominent when viewing the penalty in states like North Carolina or Texas, which have a fine of merely \$250 or allow only for equitable relief, respectively. Given the high profits of trafficking, this fine would be insignificant. Even the high monetary penalty of \$6,000 in Illinois is unlikely to deter a trafficker-recruiter.

189. See *supra* text accompanying note 78; *infra* Appendix.

190. Smith, *supra* note 59, at 543.

191. The focus of this Note is on the recruitment of migrants into the U.S. The state statutes, however, would allow for prosecution where the victim was already within the U.S. This contrasts the limited case law regarding the *fraud in foreign labor contracting* statute. See text accompanying *supra* note 129.

The suspension of a license and subsequent penalties associated with operating without a license also do not add to the deterrent effect of the state statutes. Again, due to the high profitability of trafficking, trafficker-recruiters probably do not care whether a license is suspended or revoked, if they even obtained one initially. Additionally, the penalties for operating without a license are similar to the penalties already discussed.¹⁹² At best, the trafficker-recruiter would be convicted of a misdemeanor and receive, at most, one year in prison. Furthermore, unlike the *fraud in foreign labor contracting* statute, mandatory restitution is generally not an option at the state level. Yet federal courts infrequently order mandatory restitution, and it is actually paid in even fewer cases.¹⁹³ Thus, prosecuting at the federal level does not realistically provide any additional benefit to survivors.

Some state penalties may encourage independent recruiters to perform due diligence. A license suspension or revocation alone may create the desired incentive. Independent recruiters operate for the purpose of recruitment (and presumably try to act within the law). Eliminating their ability to conduct business may incentivize them to begin verifying employment opportunities. The threat of a prison sentence could also accomplish this goal because, once again, independent recruiters who lack intent presumably want to remain in compliance with the law.

Where only a fine is provided, whether an incentive exists becomes more questionable. Recruiters charge, on average, twenty-five percent of the prospective employee's annual salary.¹⁹⁴ If a trafficker-employer tells an independent recruiter that they are seeking to fill a position for one year at \$7.25 per hour, the independent recruiter would make approximately \$2,300 per employee at a fifteen

192. See *supra* note 79.

193. See *supra* note 46. Survivors may also obtain special visas, but these visas are often hard to obtain. 2023 TIP REPORT, *supra* note 42.

194. See, e.g., *Recruitment Fee Agreement Full Guide*, RECRUITERS LINEUP, <https://www.recruiterslineup.com/recruitment-fee-agreement/> [https://perma.cc/XRJ8-YRBD] (“The most typical recruitment fees are collected as a percentage [of the employee’s annual salary], ranging between 20% to 33% with the average being 25%.”); Simeon McGee, *Recruitment Fees*, EDDY, <https://eddy.com/hr-encyclopedia/recruitment-fees/> [https://perma.cc/WRV7-DF4F] (stating that the fee could be anywhere from fifteen to twenty-five percent of the employee’s first year salary).

percent rate.¹⁹⁵ Even if the position was only for three months, the independent recruiter could charge \$575 per employee. Except for a select few states, some of which require a higher *mens rea*, the statutory fines are generally set at \$1,000 or less. Some states barely even charge \$100. Compared to a \$2,300, or even a \$575 fee, the fines seem insignificant. Independent recruiters likely will not change their practices based on a single fine, especially a fine of less than \$100.

Overall, the federal *fraud in foreign labor contracting* statute and state employment agency statutes each have their benefits, but neither effectively addresses both trafficker-recruiters and independent recruiters. The *mens rea* standard for fraud in foreign labor contracting is too high to hold independent recruiters accountable. The penalties for the state statutes are too low to deter trafficker-recruiters. Furthermore, seventeen states do not have any kind of relevant statute, and four only prohibit actions related to certain industries like agriculture. Therefore, another option is required to prosecute all stand-alone recruiters.

C. A Model State Statute for All-Encompassing Liability

Although many states proceed cautiously in regulating business, the importance of addressing human trafficking is widely recognized.¹⁹⁶ Therefore, this Note proposes a model statute for prosecuting

195. This assumes: (1) federal minimum wage applies; (2) the agency calculated the fee based on a forty-hour workweek every week in the year; and (3) the agency charged a lower percent fee than average. See *Questions and Answers About the Minimum Wage*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/minimum-wage/faq> [<https://perma.cc/64SH-XAAQ>]; see *supra* note 194. State minimum wages are often set higher than federal minimum wage, at an average of \$12.30 per hour. See *State Minimum Wage Laws*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/minimum-wage/state> [<https://perma.cc/G3NW-MTUC>] (Jan. 1, 2023). The increased wages would lead to higher recruitment fees. Therefore, the fines would be even less significant compared to the increased fee. Assuming a constructive knowledge standard applies, a trafficker-employer only paying minimum wage may or may not indicate suspicious activity to an independent recruiter.

196. Smith, *supra* note 59, at 499 (“Workers rarely benefit from the protection of the criminal justice system. To some, regulating employers and conduct associated with the workplace may seem like a purely civil matter not appropriate for law enforcement intervention.”); Todres, *supra* note 178, at 85 (stating that “generally there is reluctance in the United States to regulate the private sector, especially in pursuit of humanitarian goals”).

stand-alone recruiters. The aim is to encompass both categories of stand-alone recruiters and provide for effective and fair prosecution. The hope is for states to fully recognize the gravity of labor trafficking and take further steps to address it at the source.¹⁹⁷

1. *The Model Statute*

The model statute would contain the following general language:¹⁹⁸

(1) This statute applies to any person, business, or organization, regardless of licensing status, who—for a fee or anything of value, whether tangible or intangible—recruits, solicits, or hires, or attempts to recruit, solicit, or hire, a person inside or outside of the United States for employment in the United States on behalf of a third-party employer. No minimum value threshold exists for the fee or thing of value. The fee or thing of value may be received from the applicant or employee, any third-party associated with the applicant or employee, the employer, or any third party associated with the employer.

(2) No one shall make or cause to be made any false statements or representations, whether verbal or written, regarding the terms and conditions of any employment or position or of any other relevant circumstances, including the total amount of fees to be paid, housing arrangements, and immigration or employment eligibility status. Written communications include information printed in physical form or transmitted through technological means.

(3) Any person who violates subsection (2) is guilty of a misdemeanor and shall be punished by a minimum fine equivalent to the fee charged for service, minimum imprisonment of one year, or both.

(4) Any person who violates subsection (2):

197. The existence of labor contracting statutes indicates some states have more willingness to adopt a statute directed at recruitment for trafficking in persons. *See infra* Appendix. On the other hand, these states may only have adopted such statutes due to their limited application. *See infra* Section III.C.1.

198. The model statute pulls from the text of the state employment agency and federal *fraud in foreign labor contracting* statutes, as well as a number of the state labor contracting statutes. *See* statutes cited *infra* Appendix. Additionally, the model statute serves the purpose to provide a framework to build upon—not a finished product.

(a) knowing or having reason to know the representations were false shall be punished with a fine that is, at minimum, twice any fee charged for service, imprisonment not to exceed two years, or both;

(b) with the intent to defraud is guilty of a felony that shall be punished with a fine that is, at minimum, five times any fee charged for service, imprisonment up to five years, or both; or

(c) having been found in violation of the subsection previously shall be punished as if he or she violated the section knowingly, according to subsection (4).

(5) (a) The department of labor is authorized to investigate violations. Cases shall then be forwarded on to the state attorney general or local district attorney for prosecution.

(b) In addition to any other investigative measures established, the department of labor shall establish a hotline, including call, text, online chat services, and an online tip reporter, to enable anonymous reporting of alleged violations.

(6) A court shall order restitution upon conviction under subsections (3) or (4).

(7) A violation of subsection (2) may be rebutted if the person establishes a good faith defense.¹⁹⁹ He or she must prove:

(a) he or she did not have subjective knowledge the statements were false;

(b) he or she made reasonable affirmative efforts to determine the truthfulness of the circumstances regarding the employment opportunity or position;

(c) he or she was mistaken as to those circumstances; and

(d) a reasonable person would have also been mistaken and acted similarly in those circumstances.²⁰⁰

The person must have written documentation of each step he or she took to verify the truthfulness of employment.

199. Advocates propose the good faith defense to alleviate concerns regarding strict liability crimes. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 462 (1993). Although U.S. courts do not implement the good faith defense, inclusion in this statute could act as a tool to dissuade concerns over regulating business activities. *See id.* at 454.

200. *Id.* at 462–63.

(8) A lack of intent is not a defense against a violation of subsection (2).

2. *Limitations and Benefits*

This proposed model statute intentionally addresses major issues seen in the existing state and federal statutes while retaining their benefits.²⁰¹ First, the application provision is broadly worded to fully encompass stand-alone recruiters and prevent them from potentially escaping liability on a technicality. The text explicitly includes recruitment abroad to ensure trafficker-recruiters who travel outside of the U.S. could be prosecuted. Recruitment that occurs within the U.S. is also specified to prevent an interpretation like that seen in *Mohammed* concerning the federal *fraud in foreign labor contracting* statute.²⁰² Stand-alone recruiters who misrepresent opportunities to migrants already within the U.S. would face liability.

The phrase “within the U.S.,” combined with the irrelevance of licensing, means the statute applies to any relevant domestic activity. Although this ensures both trafficker-recruiters and independent recruiters operating in the U.S. are liable, the statute could have unintended consequences in personal settings. For example, recommending a job to a friend would be a violation if the job description was inaccurate, even if the recommender did not realize the inaccuracy. As such, the fee clause is included in the application provision to narrow the statute’s scope. Requiring a recruiter to receive something of value limits the statute to those engaged in a business transaction. Yet multiple safeguards, like allowing receipt of the fee or thing of value from non-employers, are in place to ensure trafficker-recruiters and independent recruiters do not escape liability. In particular, due to the personal relationships that can exist between a trafficker-recruiter and victim, no minimum value is assigned.²⁰³

201. Courts may interpret the statute in a manner that prevents resolution of these issues. Additionally, aside from due process, constitutional considerations are beyond the scope of this Note, and therefore, consideration of them is absent.

202. See *supra* text accompanying notes 129–30.

203. LANE ET AL., *supra* note 25, at 52.

Second, the statute attempts to remove any ambiguity regarding the need for a writing or the inclusion of online content. Although many states appear to effectively address both verbal and written statements, adoption of language similar to that used in Wisconsin's and West Virginia's statutes may eliminate any confusion.²⁰⁴ Additionally, defining a written communication removes any ambiguity as to whether a writing refers to print or online sources. A broad reference to "technological means" enables the statute to maintain applicability when the primary modes of online-based recruitment change or as technology develops.

Third, the language reflects a strict liability crime to hold all independent recruiters accountable. Actual knowledge and an intent to defraud overlook the actions of independent recruiters. Similarly, constructive knowledge may not sufficiently encourage the recruiter to perform due diligence.²⁰⁵ For those concerned with imposing strict liability on a business, states could adopt the good faith defense.²⁰⁶ This would allow an independent recruiter to demonstrate that they actively took steps to avoid propagating labor trafficking. Availability of the defense would hopefully incentivize independent recruiters to take remedial actions moving forward. The consequence of this defense, and incentivizing independent recruiters to perform due diligence generally, would be increased operating costs and therefore increased recruitment fees. As such, this push would face backlash from recruiters and the business community overall.

Fourth, the state department of labor would lead the investigation. Although this requires increased collaboration during an investigation and prosecution, using the agency that commonly deals with employers and employees has great potential. Again, state agencies already entrenched in employment issues are more familiar with state labor laws, have more experience engaging with the business community, and have greater access to businesses. To further aid investigative efforts, such as providing anonymity to incentivize

204. *See supra* Section II.B.1.

205. *See supra* Section III.B.1.

206. Levenson, *supra* note 199, at 462–63.

reporting, the statute requires the department of labor to establish a hotline.²⁰⁷

Next, the penalties were established to enable the greatest deterrence for both types of stand-alone recruiters.²⁰⁸ The fine is based on the fee a recruiter may charge for their services to eliminate the potential for them to profit in any form. At minimum, a recruiter would have no net gains. For independent recruiters, however, the recruitment fees usually help cover the cost of operation.²⁰⁹ As such, a fine equal to the fee charged would likely cause the independent recruiter to lose money because they expended resources to find the exploited employee and are now being fined for such actions. Furthermore, the fine and prison sentence increase if a recruiter acts with knowledge or intent to defraud. The statute establishes the sliding scale to effectively punish and deter trafficker-recruiters. A violation of the prohibition with

207. An anonymous hotline provides an alternative for migrants weary of law enforcement or afraid to report their employer. National trafficking and U.S. Department of Labor hotlines exist, but they focus on the overall trafficking situation—not necessarily recruitment—or on violations of federal law. *Domestic Trafficking Hotlines*, U.S. DEP'T OF STATE, OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., <https://www.state.gov/domestic-trafficking-hotlines/> [<https://perma.cc/QJN4-VF3B>]. In particular, the National Human Trafficking Hotline connects potential victims to resources and “facilitates reporting to specialized human trafficking task forces, federal authorities, local law enforcement, and service providers throughout the country.” *National Human Trafficking Hotline*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. ON TRAFFICKING IN PERS. (Oct. 22, 2019), <https://www.acf.hhs.gov/otip/victim-assistance/national-human-trafficking-hotline#:~:text=The%20hotline%20takes%20tips%20about,service%20providers%20throughout%20the%20country> [<https://perma.cc/32W8-LWW9>]; see also *When You Reach Us*, POLARIS, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/when-you-reach-us> [<https://perma.cc/X3JA-VVRN>]. Furthermore, this hotline focuses on trafficking as a whole, which may encompass trafficker-recruiters' actions but likely excludes assessing the independent recruiters' actions. *Get Help*, POLARIS, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/get-help> [<https://perma.cc/X5C4-RNXA>] (describing when to contact the hotline). In contrast, the proposed state hotline would provide direct access to the investigating agency. A narrow focus on recruitment could also increase the potential for limiting the level of harm a migrant endures. A migrant could report a recruiter's misrepresentations soon after the migrant realizes that the job they are performing is not the job they agreed to perform, which may lead to an earlier investigation. That investigation would also include some form of an evaluation of the trafficker-recruiter's actions, which could inadvertently support further investigation and prosecution of the overall labor trafficking scheme.

208. Due to the scope of licensing, the model statute omits consideration of license suspension and revocation, despite the potential to incentivize independent recruiters. See *supra* Section III.C.1.

209. See generally, e.g., Christian Sculthorp, *A Complete Guide to Calculating Agency Margins (+Free Calculator)*, AGENCY ANALYTICS, <https://agencyanalytics.com/blog/agency-margins> [<https://perma.cc/8BH9-8V8E>] (Jun. 17, 2023) (discussing how a recruitment company should calculate profit margins, including consideration of overhead costs and the cost to employ recruiters).

intent to defraud creates something akin to the federal *fraud in foreign labor contracting* statute, with similar punishment. The statute also establishes mandatory restitution to provide a remedy for survivors, assuming the courts actually order such restitution.²¹⁰

Despite the uniformity and potential deterrent effect of the model statute, it merely addresses potential legislative issues with prosecuting stand-alone recruiters. It does not address practical barriers to investigation and prosecution, such as the lack of sympathy for migrant workers, the complexity of labor trafficking, and current lack of resources.

CONCLUSION

Effectively prosecuting stand-alone recruiters can only reduce labor trafficking so much.²¹¹ Recognizing existing avenues for prosecuting stand-alone recruiters is important. The *fraud in foreign labor contracting* statute provides a seemingly effective option for addressing trafficker-recruiters, but this offense is greatly under-prosecuted. In the absence of federal action or where independent recruiters are involved, states could pursue violations of employment agency regulations. Many of these statutes, however, still require a *mens rea* that is likely higher than an independent recruiter possessed. Additionally, prosecution under a state statute faces other barriers, including limited penalties that probably provide little (if any) deterrence to trafficker-recruiters. The proposed model state statute combines helpful language from various statutes while still retaining the benefits of existing state statutes. Although states are unlikely to enact the statute, the language reemphasizes potential barriers to prosecuting stand-alone recruiters under existing legislation. By

210. See 18 U.S.C. § 1593; LEVY, *supra* note 46, at 4–5.

211. Prosecution is not the only solution. Although prosecution of stand-alone recruiters may affect the trafficking supply chain by reducing migrants' vulnerability upon entering employment, other law and policy gaps facilitate labor trafficking. Giovagnoni & Nikkel, *supra* note 27 (“[T]he reality is that forced labor is a symptom of more complex societal issues. These issues include a need for immigration reform, lack of visa regulations, racial and gender discrimination, and other forms of institutionalized oppression.”); see *supra* Section I.B.3; see Smith, *supra* note 59, at 498.

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acknowledging these shortcomings, however, prosecutors may better understand how and when to pursue stand-alone recruiters.²¹²

212. Such recognition, however, does not account for investigational barriers. *See supra* Section I.B.3.

APPENDIX: FIFTY STATE SURVEY OF EMPLOYMENT AGENCY LAWS

State	Method of Conveying False Information	Mens Rea	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
AL	NA	NA	NA	NA	NA
AK ²¹³	written	strict liability	department of labor and workforce development	suspended or revoked license; if violated willfully, misdemeanor punishable by a maximum fine of \$1,000, six months imprisonment, or both	NA
AZ ²¹⁴	duty to ensure no false information in verbal or written (print) representations		attorney general or department of law	class 2 misdemeanor punishable by a maximum fine of \$750, four months imprisonment, or both	NA
AR ²¹⁵	verbal	actual or constructive knowledge	director of the division of labor	a fine of \$25 to \$500	NA
	written	strict liability			
CA ²¹⁶	verbal or written	strict liability	attorney general, district attorney, or city attorney	misdemeanor punishable by a maximum fine of \$1,000, six months imprisonment, or both; enjoinder	farming and foreign labor contractors, nurses' registries, job listing services, employment counseling services, talent agencies

213. ALASKA STAT. ANN. §§ 23.15.410(a), .490(7), .510 (West, Westlaw through ch. 12 of 2023 1st Reg. Sess. of the 33d Leg.); *see* ALASKA STAT. ANN. § 23.05.010 (West, Westlaw through ch. 12 of 2023 1st Reg. Sess. of the 33d Leg.).

214. ARIZ. REV. STAT. ANN. §§ 41-191.10, -195 (Westlaw through 1st Reg. Sess. of 56th Leg. (2023)); ARIZ. REV. STAT. ANN. §§ 13-707(A)(2), -802 (Westlaw through 1st Reg. Sess. of 56th Leg. (2023)).

215. ARK. CODE ANN. §§ 11-11-203(a), -224(a), (f) (West, Westlaw through acts of 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.).

216. CAL. CIV. CODE §§ 1812.508(b)(1), .513(b)(1), .520(b)(1), .523(a), .533(b)(1) (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.); CAL. BUS. & PROF. CODE § 9998.3 (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 36 of 2023 Reg. Sess.); CAL. LAB. CODE §§ 1696(2), 1700.32 (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.); CAL. PENAL CODE § 19 (West, Westlaw through ch. 1 of 2023-24 1st Extraordinary Sess., and urgency legis. through ch. 31 of 2023 Reg. Sess.).

State	Method of Conveying False Information	Mens Rea	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
CO ²¹⁷	written	knowledge	attorney general or district attorney	class 2 misdemeanor punishable by a maximum fine of \$1,000, imprisonment not to exceed one year, or both; payment of restitution	field labor contractors
CT ²¹⁸	verbal	knowledge	labor commissioner	suspended license	NA
	written	strict liability			
DE	NA	NA	NA	NA	NA
DC	NA	NA	NA	NA	NA
FL ²¹⁹	NA	NA	NA	NA	farm labor contractors, talent agencies
GA	NA	NA	NA	NA	NA
HI ²²⁰	verbal or written	strict liability	director of commerce and consumer affairs	a maximum fine of \$1,000 per violation, six months imprisonment, or both; revoked or suspended license	NA
ID ²²¹	NA	NA	NA	NA	migrant farm labor contractors

217. COLO. REV. STAT. ANN. § 18-5-307(5.5)(d), (6) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assembly (2023)); COLO. REV. STAT. ANN. § 18-1.3-505 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assembly (2023)); COLO. REV. STAT. ANN. § 8-4-116 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assembly (2023)). Placement of the prohibition in the criminal code implies the attorney general or district attorney's involvement. *See* § 18-5-307.

218. CONN. GEN. STAT. ANN. §§ 31-131a(h), -131c(a) (West, Westlaw through 2023 Reg. Sess.); *see* CONN. GEN. STAT. ANN. § 31-1 (West, Westlaw through 2023 Reg. Sess.)

219. FLA. STAT. ANN. §§ 450.34(2), 468.412(6) (West, Westlaw through June 16, 2023, in effect from 2023 Spec. B Sess. and 2023 1st Reg. Sess.).

220. HAW. REV. STAT. ANN. §§ 373-11(1), -14, -20 (West, Westlaw through Act 102 of 2023 Reg. Sess.); *see* HAW. REV. STAT. ANN. § 373-1 (West, Westlaw through Act 102 of 2023 Reg. Sess.).

221. IDAHO CODE ANN. § 44-1608(2) (West, Westlaw through ch. 1 to 314 of 2023 1st Reg. Sess. of 67th Idaho Leg.).

State	Method of Conveying False Information	Mens Rea	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
IL ²²²	verbal	knowledge	director of labor	civil penalty up to \$6,000 plus \$2,500 for repeat violations within three years; revoked license and double the penalty for willful violations within three years	job listing services
	written	strict liability			
IN	NA	NA	NA	NA	NA
IA	NA	NA	NA	NA	NA
KS ²²³	verbal or written	strict liability	secretary of labor, who reports to the attorney general, district attorney, or county attorney	class C misdemeanor punishable by a maximum fine of \$500, one month imprisonment, or both	NA
KY	NA	NA	NA	NA	NA
LA ²²⁴	written	actual or constructive knowledge	assistant secretary of the office of workforce development	a maximum fine of \$500 per violation; revoked or suspended license	NA
ME	NA	NA	NA	NA	NA
MD ²²⁵	written	strict liability	repealed enforcement statute	misdemeanor punishable by a maximum fine of \$1,000, one year imprisonment, or both	NA
MA ²²⁶	written	strict liability	commissioner of labor and industries	a maximum fine of \$500, one year imprisonment, or both per violation; revoked or suspended license	NA
MI	NA	NA	NA	NA	NA

222. 225 ILL. COMP. STAT. ANN. 515/10, /12.2 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.); 815 ILL. COMP. STAT. ANN. 630/9 (West, Westlaw through P.A. 103-21 of 2023 Reg. Sess.).

223. KAN. STAT. ANN. §§ 44-408 to -410 (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.); KAN. STAT. ANN. §§ 21-6602(a)(3), -6611(b)(3) (West, Westlaw through 2023 Reg. Sess. of Kan. Leg.).

224. LA. STAT. ANN. §§ 23:108(B)(1), :111(C)(4) (Westlaw through 2023 1st Extraordinary Sess.); *see* LA. STAT. ANN. § 23:101(3) (Westlaw through 2023 1st Extraordinary Sess.).

225. MD. CODE ANN., BUS. REG. §§ 9-302(8), -401 (West, Westlaw through 2023 Reg. Sess. of Gen. Assemb.); *see supra* note 78.

226. MASS. GEN. LAWS ANN. ch. 140, §§ 46K(1), 46Q, 46R (West, Westlaw through ch. 6 of 2023 1st Annual Sess.); *see* MASS. GEN. LAWS ANN. ch. 140 § 46A (West, Westlaw through ch. 6 of 2023 1st Annual Sess.).

State	Method of Conveying False Information	<i>Mens Rea</i>	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
MN ²²⁷	written	knowledge	department of labor and industry	misdemeanor punishable by a maximum fine of \$1,000, ninety days imprisonment, or both; injunction	NA
MS	NA	NA	NA	NA	NA
MO	NA	NA	NA	NA	NA
MT	NA	NA	NA	NA	NA
NE ²²⁸	NA	NA	NA	NA	farm labor contractors
NV ²²⁹	verbal or written	strict liability	labor commissioner, who reports to the county district attorney	misdemeanor punishable by a maximum fine of \$1,000, six months imprisonment, or both; maximum administrative penalty of \$5,000 per violation	NA
NH	NA	NA	NA	NA	NA
NJ ²³⁰	verbal, at minimum	strict liability	director of the division of consumer affairs in the department of law and public safety	a maximum fine of \$2,000 for the initial violation and \$5,000 per subsequent violation; injunction; revoked license; payment of restitution	NA
NM	NA	NA	NA	NA	NA

227. MINN. STAT. ANN. §§ 184.24, .38 subdiv. 8, .41 (West, Westlaw through 2023 Reg. Sess.); MINN. STAT. ANN. § 609.02 subdiv. 3 (West, Westlaw through 2023 Reg. Sess.); *see* MINN. STAT. ANN. § 184.21 subdiv. 7 (West, Westlaw through 2023 Reg. Sess.).

228. NEB. REV. STAT. ANN. § 48-1712 (West, Westlaw through 1st Reg. Sess. of the 108th Leg. (2023)).

229. NEV. REV. STAT. ANN. §§ 611.270, .310, .320 (West, Westlaw through 82d Reg. Sess. (2023)); NEV. REV. STAT. ANN. § 193.150 (West, Westlaw through 82d Reg. Sess. (2023)).

230. N.J. STAT. ANN. §§ 34:8-52(g), -55, -58, -61 (West, Westlaw through L.2023, c. 64, and J.R. No. 10); *see* N.J. STAT. ANN. § 34:8-43 (West, Westlaw through L.2023, c. 64, and J.R. No. 10).

State	Method of Conveying False Information	Mens Rea	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
NY ²³¹	written	strict liability	commissioner of labor; the commissioner of consumer affairs in the city of New York; attorney general	misdemeanor punishable by a maximum fine of \$2,500, one year imprisonment, or both	farm labor contractors
NC ²³²	verbal	knowledge	commissioner of labor	a maximum fine of \$250; revoked or suspended license	NA
	written	strict liability			
ND ²³³	written	knowledge	labor commissioner	class A misdemeanor punishable by a maximum fine of \$3,000, 360 days imprisonment, or both; revoked or suspended license	NA
OH	NA	NA	NA	NA	NA
OK ²³⁴	written	knowledge	attorney general or district attorney	misdemeanor punishable by a fine of \$50 to \$100 or of the fee charged for service (whichever is greater), six months imprisonment, or both	NA
OR ²³⁵	verbal or written	knowledge	commissioner of the bureau of labor and industries	civil penalty up to \$2,000; enjoinder	farm, construction, and property services (janitorial) contractors

231. N.Y. GEN. BUS. LAW §§ 187(2), 189(1), 190 (McKinney, Westlaw through L.2023, chs. 1 to 191); N.Y. LAB. LAW § 212-a(5)(c) (McKinney, Westlaw through L.2023, chs. 1 to 191).

232. N.C. GEN. STAT. ANN. §§ 95-47.6(2), (9), -47.9(a), (c)(1) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.); *see* N.C. GEN. STAT. ANN. § 95-47.1(3) (West, Westlaw through S.L. 2023-34 of 2023 Reg. Sess. of Gen. Assemb.).

233. N.D. CENT. CODE ANN. §§ 34-13-08, -15(7), -16 (West, Westlaw through 2023 Reg. Sess.); N.D. CENT. CODE ANN. § 12.1-32-01(5) (West, Westlaw through 2023 Reg. Sess.); *see* N.D. CENT. CODE ANN. § 34-13-01(1) (West, Westlaw through 2023 Reg. Sess.).

234. OKLA. STAT. ANN. tit. 40, §§ 55(g), 57 (West, Westlaw through 1st Reg. Sess. of 59th Leg. and the 1st Extraordinary Sess. of 59th Leg. (2023)).

235. OR. REV. STAT. ANN. §§ 658.115(1), .195(1), .220(1), .405(5), .405(6), .440(3)(b) (West, Westlaw through 2023 Reg. Sess. of 82d Legis. Assemb.).

State	Method of Conveying False Information	<i>Mens Rea</i>	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
PA ²³⁶	verbal or written	strict liability	city director of public safety	misdemeanor punishable by a maximum fine of \$100, one year imprisonment, or both; revoked or suspended license	farm labor contractors
RI	NA	NA	NA	NA	NA
SC ²³⁷	written	actual or constructive knowledge	a number of state agencies, including the division of labor and attorney general	misdemeanor punishable by a maximum fine of \$500, one year imprisonment, or both; surrendered license	NA
SD	NA	NA	NA	NA	NA
TN ²³⁸	verbal	strict liability	attorney general	enjoinment; injunction or other appropriate equitable relief	NA
	written	knowledge			
TX ²³⁹	verbal, at minimum	strict liability	repealed enforcement statute	if violated knowingly, class A misdemeanor punishable by a maximum fine of \$4,000, one year imprisonment, or both	NA
UT ²⁴⁰	verbal, at minimum	strict liability	repealed enforcement statute	a maximum fine of \$200 per violation; revoked license	NA
VT	NA	NA	NA	NA	NA
VA	NA	NA	NA	NA	NA

236. 53 PA. STAT. AND CONS. STAT. §§ 4551-4553 (West, Westlaw through 2023 Reg. Sess. Act 5); 43 PA. STAT. AND CONS. STAT. § 1301.505(1) (West, Westlaw through 2023 Reg. Sess. Act 5).

237. S.C. CODE ANN. §§ 41-25-50(b), -90, -110 (Westlaw through 2023 Act No. 83).

238. TENN. CODE ANN. §§ 47-18-1703(5), (11), -1706, -1707 (West, Westlaw through 2023 Reg. Sess. of 113th Tenn. Gen. Assemb.).

239. TEX. OCC. CODE ANN. §§ 2501.101(a)(2), .251 (West, Westlaw through 2023 Reg. Sess. of 88th Leg.) (prohibiting one from making false or misleading statements in Section 2501.101(a)(2) then providing for a criminal penalty in Section 2501.251 if one performs such conduct knowingly); TEX. PENAL CODE ANN. § 12.21 (West, Westlaw through 2023 Reg. Sess. of 88th Leg.); *see* TEX. OCC. CODE ANN. §§ 2501.151 to .154 (West, repealed 2011).

240. UTAH CODE ANN. § 34-29-15 (West, Westlaw through 2023 Gen. Sess.); *see* 2008 Utah Laws 1539 (including Senate Bill 60, which repealed “the responsibilities of the Labor Commission related to employment agencies”).

State	Method of Conveying False Information	<i>Mens Rea</i>	State Enforcement Agency	Offense Type and Penalty	Context of Additional Recruitment-Based Statutes
WA ²⁴¹	written	actual or constructive knowledge	director of licensing, who reports to the attorney general or county prosecutor	court action “to restrain and prevent” commission of a violation; civil penalty up to \$5,000 for violating any court order or injunction	farm labor contractors
WV ²⁴²	verbal, at minimum	knowledge	commissioner of labor and state tax commissioner	misdemeanor punishable by a fine of \$50 to \$200 per violation, thirty days imprisonment, or both; revoked license	NA
WI ²⁴³	verbal, at minimum	strict liability	department of safety and professional services	a fine of \$10 to \$100 per violation; suspended or revoked license	migrant labor contractors
WY ²⁴⁴	verbal or written	strict liability	department of workforce services, who reports to the attorney general or county district attorney	misdemeanor punishable by fine of \$50 to \$100, six months imprisonment, or both; revoked license	NA

241. WASH. REV. CODE ANN. §§ 19.31.190(4), .210, .230 (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.); WASH. REV. CODE ANN. § 19.30.120(2) (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.); *see* WASH. REV. CODE ANN. § 19.31.020(3) (West, Westlaw through 2023 Reg. Sess. and 1st Spec. Sess. of Wash. Leg.).

242. W. VA. CODE ANN. §§ 21-2-6, -10, -14 (West, Westlaw through 2023 Reg. Sess.).

243. WIS. STAT. ANN. §§ 105.02, .13, .15 (West, Westlaw through 2023 Act 10); WIS. STAT. ANN. §§ 103.005(12)(a), .91(9)(a) (West, Westlaw through 2023 Act 10); *see* WIS. STAT. ANN. § 101.01(1m) (West, Westlaw through 2023 Act 10).

244. WYO. STAT. ANN. §§ 27-8-104, -107, -108, -111 (West, Westlaw through 2023 Gen. Sess. of Wyo. Leg.).