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Legal Responses to Human Trafficking in Arkansas

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By Annie B. Smith

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Human trafficking exists throughout the United States, and Arkansas is no exception. While it can take many forms, human trafficking occurs when someone is exploited for profit and not free to leave.

Human Trafficking in Arkansas

Reports of human trafficking peppered newspaper headlines this spring. In March, a former Razorbacks player was arrested and charged with human trafficking.¹ He and another man were accused of providing a minor for commercial sex acts.² A week later, a Fayetteville man was sentenced to 25 years in federal prison for the sex trafficking of a child.³ In late April, a woman was arrested at a Little Rock motel for human trafficking in another case involving minors.⁴

Our court dockets also contain troubling tales of human trafficking. A group of guestworkers who lawfully entered the United States on temporary work visas were brought to Arkansas to plant pine saplings.⁵ The workplace abuses they experienced eventually escalated to human trafficking.⁶ In a lawsuit brought by the guestworkers against their former employer, the court held that “threatening [guest]workers with serious immigration consequences in order to prevent them from leaving employment” can constitute human trafficking.⁷



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As these examples illustrate, there are two forms of human trafficking: sex and labor. Both are prohibited by international, federal, and state law. Sex trafficking tends to be better publicized and more frequently prosecuted. However, labor trafficking is also a recognized form of what some refer to as modern day slavery. A recent study reported that labor trafficking occurs most commonly in agriculture, domestic service, construction, and hospitality.⁸

Estimates of the number of trafficked individuals are notoriously unreliable.⁹ However, in 2014, the National Human Trafficking Resource Center (NHTRC) received 102 calls regarding suspected human trafficking in Arkansas.¹⁰ Of those, 17 potential instances of human trafficking were identified; 14 involved sex trafficking and three involved labor trafficking. Many more instances of human trafficking go unnoticed and unreported. Trafficked individuals rarely identify their situations as human trafficking and, in some instances, may even deny that they are being victimized.

The human trafficking reported to NHTRC was concentrated in Fort Smith, Little Rock, Hot Springs, Jonesboro, and near Memphis.¹¹ Law enforcement officials believe that Route I-40 is a common path for traffickers between the human trafficking hubs of Memphis and Tulsa.

Common Misconceptions

Numerous misconceptions regarding human trafficking persist.¹² Despite its name, human trafficking does not require movement of any kind. Physical force or restraint is not required either; the coercion exerted by a trafficker may be solely psychological. Trafficked individuals can be native born or immigrants, lawfully present in the United States or not, and any age, gender, race, or ethnicity. Traffickers and their victims may be strangers or closely related. Situations that do not start as human trafficking, such as a voluntary employment relationship, may evolve into trafficking if the employee is later coerced to work against his or her will. Finally, while illegal, not all commercial sex acts constitute human trafficking. As described in greater detail below, only commercial sex acts by minors are *per se* human trafficking.

Despite the presence of human trafficking in our region, interest in the issue, and recent improvements to our laws, there have

Recognizing the Signs of Human Trafficking

The presence of the red flags below are an indication that further assessment may be necessary to identify a potential human trafficking situation. This list is not exhaustive and represents only a selection of possible indicators. The red flags may not be present in all trafficking cases and are not cumulative.

Common Work and Living Conditions

- Is not free to leave or come and go as he/she wishes
- Is in the commercial sex industry and has a pimp / manager
- Is unpaid, paid very little, or paid only through tips
- Works excessively long and/or unusual hours
- Is not allowed breaks or suffers under unusual restrictions at work
- Owes a large debt and is unable to pay it off
- Was recruited through false promises concerning the nature and conditions of his/her work
- High security measures exist in the work and/or living locations (e.g. opaque windows, boarded up windows, bars on windows, barbed wire, security cameras, etc.)

Poor Mental Health or Abnormal Behavior

- Is fearful, anxious, depressed, submissive, tense, or nervous/paranoid
- Exhibits unusually fearful or anxious behavior after bringing up law enforcement
- Avoids eye contact

Poor Physical Health

- Lacks medical care and/or is denied medical services by employer
- Appears malnourished or shows signs of repeated exposure to harmful chemicals
- Shows signs of physical and/or sexual abuse, physical restraint, confinement, or torture

Lack of Control

- Has few or no personal possessions
- Is not in control of his/her own money, no financial records, or bank account

- Is not in control of his/her own identification documents (ID or passport)
- Is not allowed or able to speak for themselves (a third party may insist on being present and/or translating)

Other

- Claims of just visiting and inability to clarify where he/she is staying/address
- Lack of knowledge of whereabouts and/or of what city he/she is in
- Loss of sense of time
- Has numerous inconsistencies in his/her story

Note: According to state and federal law, any minor under the age of 18 engaging in commercial sex is a victim of sex trafficking, regardless of the presence of force, fraud, or coercion.

Call the National Human Trafficking Resource Center (NHTRC) toll-free hotline at (888) 373-7888, 24 hours a day, 7 days a week, to report potential human trafficking. All reports are confidential and you may remain anonymous. Interpreters are available.

Source: National Human Resource Trafficking Center⁶⁶

<http://www.traffickingresourcecenter.org/what-human-trafficking/recognizing-signs>

Additional Resources

- Polaris Project
<http://www.polarisproject.org>
- Human Trafficking Pro Bono Resource Center
<http://www.htprobono.org>
- Human Trafficking and the State Courts Collaborative
<http://www.htcourts.org>
- Arkansas State Task Force for the Prevention of Human Trafficking
<http://arkansasag.gov/programs/criminal-justice/human-trafficking-task-force>
- Department of State Trafficking in Persons Report
<http://www.state.gov/j/tip/rls/tiprpt/index.htm>

been relatively few criminal prosecutions and virtually no civil suits against traffickers in Arkansas courts. Indeed, trafficking victims are sometimes prosecuted for coerced activities that occurred as a result of their trafficking. Greater knowledge of the signs of human trafficking and laws related to it will help Arkansas attorneys and judges better identify and respond to human trafficking.

The Legal Framework

International, federal, and state law all address human trafficking.¹³ Laws explicitly addressing human trafficking and passed since 2000 supplemented existing prohibitions on slavery, forced labor, commercial sex, and other forms of exploitation.

International Anti-Trafficking Law

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (commonly referred to as the “Palermo Protocol”), was adopted by the United Nations in 2000¹⁴ and ratified by the United States in 2005.¹⁵ The Palermo Protocol defines trafficking in persons and sets out requirements for the criminalization and prosecution of traffickers, protection and care for trafficked persons, and monitoring and coordinated prevention of trafficking.

Federal Anti-Trafficking Law

Congress enacted the Trafficking Victims Protection Act (“TVPA”)¹⁶ in 2000. Subsequent amendments and reauthorizations have largely expanded and strengthened the federal statute’s protections.¹⁷ The TVPA takes a three-prong approach to trafficking: prevention, protection, and prosecution. The TVPA prohibits a variety of human trafficking-related activities, including forced labor,¹⁸ sex trafficking of children and sex trafficking by force, fraud or coercion,¹⁹ trafficking with respect to peonage, slavery, involuntary servitude or forced labor,²⁰ and unlawful conduct with regard to government identification and immigration documents.²¹ The TVPA applies extraterritorially; so long as the trafficker is a U.S. citizen, lawful permanent resident, or present in the United States, he or she can be held liable for acts that occurred abroad.²²

Arkansas Anti-Trafficking Laws

In recent years, the Arkansas legislature has

made efforts to improve the state’s response to human trafficking. In 2013, it enacted the Arkansas Human Trafficking Act and two related acts.²³ Like the federal law, Arkansas law also seeks to prevent trafficking, protect survivors, and prosecute traffickers.²⁴ Prevention strategies include posting requirements for certain establishments²⁵ and creation of a state human trafficking task force.²⁶ Protection strategies include a civil remedy for trafficked persons,²⁷ creation of a state plan to provide assistance to trafficking victims and sexually exploited children,²⁸ and a Safe Harbor Fund for Sexually Exploited Children.²⁹ In addition, a person convicted of prostitution may now file a petition to seal the conviction if it was obtained as a result of being a victim of human trafficking.³⁰ Arkansas law criminalizes trafficking in persons, authorizes forfeiture of conveyances used in the commission or attempt of trafficking in persons,³¹ and requires payments to the Safe Harbor Fund by individuals convicted of trafficking in persons, prostitution, or solicitation of services.³² Arkansas law also provides for training of law enforcement and prosecutors and creation of an interim study on the problem of child sex trafficking and the commercial sexual exploitation of children in Arkansas.³³

In recognition of the state’s 2013 legislative activity, the national advocacy organization Polaris Project named Arkansas the most improved state in anti-human trafficking laws.³⁴ However, Polaris Project still recommends that Arkansas adopt stronger legislation to vacate convictions of trafficking victims.³⁵ There continues to be considerable interest in human trafficking-related legislation. During the 2015 legislative session, at least 11 bills were introduced related to the issue.³⁶

Under Arkansas law, a person engages in trafficking in persons if he or she knowingly: “(1) recruits, harbors, transports, obtains, entices, solicits, isolates, provides, or maintains a person knowing that the person will be subjected to involuntary servitude; (2) benefits financially or benefits by receiving anything of value from participation in a venture [under subdivision (1)]; (3) subjects a person to involuntary servitude; or (4) recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity.”³⁷ Involuntary servitude is broadly defined to include the

inducement or compulsion of a person to engage in labor, services, or commercial sexual activity by means of: a scheme, plan, or pattern of behavior with a purpose to cause a person to believe that if he or she does not engage in labor, services, or commercial sexual activity, he or she or another person will suffer serious physical injury or physical restraint; abuse or threatened abuse of the legal process; the causing of or the threat to cause serious harm to a person; physically restraining or threatening to physically restrain another person; the kidnapping of or threat to kidnap a person; the taking of another person’s personal property or real property; the knowing destruction, concealment, removal, confiscation, or possession of an actual or purported passport, other immigration document, or other actual or purported government identification document of another person; extortion or blackmail; deception or fraud; coercion, duress, or menace; debt bondage; peonage; or the facilitation or control of a victim’s access to an addictive controlled substance.³⁸

Last summer, the Arkansas Attorney General’s Human Trafficking State Task Force for the Prevention of Human Trafficking issued a report that included a series of detailed recommendations regarding how to best combat trafficking in Arkansas.³⁹ Several of the recommendations were targeted at improving services for trafficking survivors, such as licensing and regulating agencies that hold themselves out as providing services to trafficking victims and requiring all medical facilities to adopt policies regarding care and services for trafficking victims. The Task Force recommended funding human trafficking training programs for judges, public defenders, law enforcement, and other state service providers. It also recommended creating an Arkansas Prevention of Human Trafficking Board and hiring staff at the Attorney General’s office to serve as a clearinghouse and to maintain trafficking-related records and statistics. Among the Task Force’s other recommendations were increased posting requirements, continued use of the national hotline to report trafficking, and mandates for law enforcement to cooperate with immigrant trafficking victims.

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Civil Remedies for Trafficking Survivors

Under the federal TVPA, trafficked individuals can sue their traffickers and any other person or entity that knowingly benefitted from the trafficking.⁴⁰ Since 2013, Arkansas law also provides a private right of action.⁴¹ Trafficked persons can recover actual, compensatory, and punitive damages, and seek injunctive and other appropriate relief, as well as attorneys' fees and costs.⁴² When the trafficker's conduct was willful and malicious, treble damages are mandatory.⁴³

Claims under the TVPA must be brought within 10 years.⁴⁴ The statute of limitations is not specified in the Arkansas statute.⁴⁵ The statute of limitations for claims under Arkansas law does not begin to run until the trafficked individual "discovers the human trafficking incident occurred and that the defendant caused, was responsible for, or profited" from it.⁴⁶ The limitations period for minor victims does not begin until they are 18 and there are additional protections for plaintiffs who are under disability or subject to threats, manipulation, fraud, or other conduct by the trafficker intended to delay the filing.⁴⁷

A civil lawsuit that includes claims under the TVPA may be stayed pending a criminal prosecution.⁴⁸ The stay is not automatic, but may be requested by the prosecutor.

Depending on the circumstances, trafficking survivors may bring additional claims related to the exploitation. For example, in cases involving labor trafficking, claims for unpaid minimum or overtime wages can be brought under the Fair Labor Standards Act and Arkansas Minimum Wage Act.⁴⁹ Tort, contract, and other common law claims as well as civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims may be appropriate in cases involving either sex or labor trafficking.⁵⁰

Prosecution of Trafficking-Related Crimes

In 2014, the Department of Justice prosecuted 174 traffickers nationally in cases involving forced labor, sex trafficking of adults, and sex trafficking of children.⁵¹ Of those prosecutions, 113 involved predominantly sex trafficking and 25 involved predominantly labor trafficking.⁵²

Restitution is mandatory under the TVPA and requires recovery of the greater of the gross income or value to the defendant of the victim's services or labor or the value of the labor as guaranteed under the Fair Labor Standards Act.⁵³ Despite this requirement, a recent study found that restitution was awarded in only 36 percent of cases nationally.⁵⁴

Immigration Relief for Trafficking Survivors

Foreign citizens who are victims of a severe form of human trafficking may be eligible for immigration relief, including continued presence and a T-visa.

Traffickers tend to prey on the most vulnerable populations, including those who have a tenuous immigration status. For example, foreign citizens who lawfully enter the United States with a temporary work visa are no longer lawfully present if their employment ends for any reason—even if their employer breaks the law. Others may be unlawfully present in the United States or working without authorization. For example, women who were recruited to work cleaning hotels and do not have authorization to work may instead be forced to strip in nightclubs when they arrive in the United States. Such individuals are highly vulnerable to human trafficking. To ensure they are willing to step forward and help prosecute traffickers, victims need some assurance that they will be safe and have a lawful means to support themselves and those who rely on them.

Continued Presence

Law enforcement officials may request continued presence for trafficked individuals.⁵⁵ Continued presence is an important law enforcement tool. It permits the individual to temporarily remain in the United States so that he or she can assist law enforcement with investigation and prosecution of human trafficking-related crimes.⁵⁶ Because trafficked individuals may initially be too frightened or traumatized to assist law enforcement, eligibility only requires that the individual be a potential witness; cooperation is not required. Once granted, continued presence may be extended to permit the individual to resolve a civil lawsuit filed under the TVPA.⁵⁷

The T-Visa

Victims of a severe form of human trafficking may also be eligible for more permanent relief in the form of a T-visa. Applicants for a T-visa must comply with reasonable requests from law enforcement to assist in the investigation or prosecution of the trafficker, unless the applicant is under the age of 18 or unable to cooperate due to physical or psychological trauma.⁵⁸ In the absence of an investigation or prosecution, the trafficked individual can still be eligible for the T-visa. To be eligible, the trafficked individual must be physically present in the United States as a result of the trafficking and face extreme hardship invol-

ing severe harm should he or she be removed from the United States.⁵⁹ While only 5,000 T-visas may be issued annually, less than 500 have ever been issued in a single year.⁶⁰

Continued presence and the T-visa both trigger eligibility for work authorization and temporary federal benefits so that the trafficked person can sustain himself or herself during the pendency of the investigation and any resulting prosecution.⁶¹

While not specifically designed for human trafficking, the U-visa, S-visa, asylum, Violence Against Women Act self-petition, and Special Juvenile Immigrant Status offer additional options for some survivors.⁶²

Overcoming Barriers

The Attorney General's Task Force identified a variety of barriers law enforcement and social service providers face when investigating human trafficking and serving survivors.⁶³ Among the barriers are: fears of arrest and deportation, language and cultural differences, insufficient training and other resources, and lack of public awareness.⁶⁴

Lawyers also face barriers when representing survivors of trafficking and prosecuting traffickers. Bringing cases involving human trafficking requires skill and sensitivity.⁶⁵ Particularly in cases involving psychological coercion rather than physical restraint, use of experts may be necessary to educate the jury about why an individual did not feel free to leave.

Trafficking frequently involves a violation of a trust relationship, so survivors may struggle to trust their attorney, law enforcement, and prosecutors. Care should be taken to prevent the survivor from feeling coerced, controlled, or manipulated as these are the characteristics of a human trafficking relationship and may result in further harm to the individual and hamper the prosecution or representation. While it may be tempting to "rescue" trafficked persons, this approach risks inadvertently deepening a survivor's sense of powerlessness. Instead, whenever possible, they should be encouraged to make decisions and take action for themselves.

Many trafficked individuals have experienced trauma and, as a result, may have difficulty remembering details related to the human trafficking. Even if they can remember, they may be reluctant to share everything that happened and may never share every detail. In these cases, jurors may need help understanding the neurological impacts of trauma and why a survivor's story is incomplete or has changed over time. It may

also be useful to partner with qualified and experienced counselors, therapists, and case managers to provide appropriate support—particularly around potentially stressful events such as depositions and trials.

Properly trained and skilled interpreters should always be used in litigation and immigration matters involving clients with limited English proficiency. This is especially true in cases involving human trafficking. Heightened caution is required to protect the trafficked individual by ensuring the interpreter does not have a conflict of interest, accurately interprets everything that is said, and maintains strict confidentiality. [Editor's note: See article on page 20 for more information on interpreters.]

Role for the Arkansas Bar

Knowledge of human trafficking and the laws related to it will help attorneys and judges to identify trafficked individuals and ensure they receive the relief to which they are entitled. It will also help hold human traffickers accountable for their abuse of our most vulnerable populations. Diligent representation of trafficked persons and prosecution of traffickers coupled with efforts to address the roots of trafficked persons' vulnerability will go a long way towards combatting human trafficking in Arkansas.

Endnotes:

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26. ARK. CODE ANN. § 12-19-101.
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29. ARK. CODE ANN. § 19-5-1252.
30. ARK. CODE ANN. § 16-90-123.
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