The Other Side of Human Trafficking

By Louise N. Smith

The term "human trafficking" generally triggers thoughts of sex trafficking or child sex trafficking. However, as Rebecca Smith of the National Employment Lawyers Project explained during a seminar titled "The Real Cost of Human Trafficking" at the Section's Annual Conference, "people focus on sex trafficking without realizing that half of all trafficking is labor trafficking."

According to a report issued in June by the U.S. State Department, human trafficking involves "the act of recruiting, harboring, transporting, providing or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion." Ana Avendano, assistant to the president for Immigration and Community Action at the AFL-CIO, called labor trafficking "slavery without shackles; coercion and threats of retaliation are the equivalent of the shackles."

Human trafficking has no face. It transcends all industries and all levels of the workforce, from low-wage workers to high-skilled workers. "Many people often think of sex trafficking and low-income workers, but more and more we are seeing cases involving professional workers," said Avendano.

According to Anna Y. Park, regional attorney for the Equal Employment Opportunity Commission (EEOC) in its Los Angeles District Office, in many cases the foreign workers enter the United States legally on a visitor or student visa. However, once they arrive in the United States, their passports are taken and their freedom is restricted by threats to their families back home.

The EEOC has successfully litigated against employers who engage in human trafficking on the basis of national origin discrimination under Title VII of the Civil Rights Act of 1964. In *EEOC v. John Pickle Company, Inc.* (N.D. Okla. 2006), one of the first human trafficking cases the EEOC took to trial, the employer was found liable for several violations of state and federal laws, including national origin discrimination under Title VII and discrimination based on ancestry and ethnic characteristics under 42 U.S.C. § 1981.

John Pickle, an oil industry parts manufacturer based in Tulsa, Oklahoma, hired 52 workers brought to the United States from India by means of deception and treated them differently from non-Indian workers. The Indian workers were required to perform work that they were not hired to do, such as grinding welds, painting, sandblasting, insulating, janitorial duties, and yard work. The employer subjected them to nonpayment of wages, substandard living conditions, false imprisonment, lock-downs with an armed guard, phone tapping, food rationing, restrictions on freedom to worship, ethnic slurs, and threats of deportation. Federal District Court Judge Claire V. Evans found the treatment unlawfully based on the foreign workers' national origin and ordered John Pickle to pay $1.24 million in damages.

Even if the employer is not directly engaged in human trafficking but uses an employee referral or recruitment agency that is directly engaged, the employer can still be liable because Title VII imposes a nondelegable duty. In other words, the use of an employee referral or recruitment agency does not shield an employer from liability. "The nondelegable liability means that employers cannot see no evil, hear no evil, and bury their head in the sand," said Porpoise Evans, shareholder at Greenberg Taurig in Miami.

In 2006, the EEOC sued Trans Bay Steel, Inc., a small construction company, in the U.S. District Court for the Central District of California, alleging that the company discriminated against Thai welders in recruitment, hiring, pay, and other terms and conditions of employment based on their national origin.

Trans Bay Steel had contracted with a Thai-owned recruitment company that obtained guest worker visas for nine Thai welders. The Thai welders were denied the promised wages, had their passports confiscated, were held against their will in cramped apartments without basic necessities, and were threatened with deportation if they tried to escape. The EEOC settled with Trans Bay Steel for an estimated $1 million and other nonmonetary remedies.

In addition to antidiscrimination laws, labor trafficking may give rise to a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO); the Thirteenth Amendment and 42 U.S.C. § 1985(3) (the anti-civil-rights conspiracies provision of the Civil Rights Act of 1870); the Fair Labor Standards Act, 28 U.SC. § 1350 (the alien tort statute); and numerous state tort, contract, and labor claims.

Given the potentially enormous liability, employers contracting for labor should make sure that employees are coming from a legitimate source. Evans advises employers to perform background checks on both employees and employee referral services. He also advises employers to encourage self-reporting among its employees.

However, as Smith pointed out, the problem with self-reporting is that a lot of victims of human trafficking are unaware that they have rights, or they are afraid to exercise them. "Many victims don't self-report because of their physical situation, being heavily indebted to their brokers, extreme misinformation about how the United States immigration system works, and the fact that they don't realize that they have rights," said Smith.

In short, labor and employment law practitioners need to be aware of the other side of human trafficking: it is not just a criminal and immigration problem. It is a labor and employment problem as well.

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