

State Model Law on Protection for Victims of Human Trafficking



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June 2005

INTRODUCTION

The State Model Law on Protection for Victims of Human Trafficking is a tool for state legislators and advocates who are interested in developing state anti-trafficking laws that ensure the protection of the rights of trafficked persons. The drafters and supporters of the State Model Law are lawyers and service providers who provide direct services to, and advocate on behalf of, trafficked persons. We have relied extensively on the collective experience of the 24 members of the Freedom Network (USA)¹, who have provided legal and social services for hundreds of trafficked persons and who have conducted trainings for over a thousand community-based organizations - often in collaboration with federal and local law enforcement officials. Additionally, a number of Freedom Network (USA) members were involved in drafting the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000 and continue to recommend improvements to the Act. (See Annex for list of organizations that can provide further information on the VTVPA and trafficking cases in the U.S.)

The VTVPA has been used successfully to prosecute a large number of human traffickers and to provide services and protect the rights of a substantial number of trafficked persons. However, the federal government alone cannot uncover and prosecute all of the large and small trafficking rings operating within the United States. State and local authorities are often more likely to encounter victims of trafficking while conducting routine arrests, inspecting buildings, factories and farms, operating fire, rescue and medical emergency services and working with child abuse and neglect cases. For this reason, it is necessary for state legislators and officials to learn more about human trafficking and to consider adopting laws that will allow local and state officials to investigate, prosecute and punish human traffickers and to provide appropriate and adequate services for, and to protect the rights of, trafficked persons.

The State Model Law is based, in part, upon the “Model State Anti-Trafficking Criminal Statute” developed by the Department of Justice (DOJ). The DOJ Model Criminal Statute is very good but it only covers criminalization and also contains a number of gaps and inconsistencies. The State Model Law

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¹ www.freedomnetworkusa.org

Definitions and Criminal Provisions sections are based upon the DOJ document; however, the State Model Law fills in the gaps and corrects the inconsistencies of the DOJ Model Criminal Statute.

OVERVIEW OF THE STATE MODEL LAW

Purpose, Findings, and Definitions

Psychological coercion added to “Forced Labor”: At the request of DOJ attorneys, Congress included the element of psychological coercion into the VTVPA. Prior to the VTVPA, prosecutors had encountered difficulties in prosecuting many trafficking cases because the involuntary servitude statute, which was routinely used in pre-VTVPA trafficking cases, requires force or the threat of physical restraint or injury. However, since many traffickers routinely avoid force and use psychological coercion to hold their victims in captivity, those traffickers were not prosecutable prior to the VTVPA. The DOJ Model Criminal Statute omitted to include this important element but it is included in the State Model Law under the definition of “Forced Labor” (see (f)(7)).

New definitions: The DOJ Model Criminal Statute does not define a number of key terms. The State Model Law adds definitions for the following terms: Actor, Debt Bondage, Minor, Venture and Trafficked Person/Victim of Trafficking/Trafficking Victim.

Criminal Provisions

Crimes:

The definition of ‘involuntary servitude’ has been simplified to eliminate inconsistencies contained in the DOJ Model Criminal Statute. The DOJ document defines involuntary servitude as ‘knowingly’ subjecting, or attempting to subject “another person to forced labor.” However, it also contains one list of elements by which people are held in involuntary servitude and a different list of elements by which people are held in forced labor, so these two lists overlap and conflict. The State Model Law corrects this problem because it contains only one list of elements.

The crime of ‘Unlawful Conduct with Respect to Document in Furtherance of Trafficking or Involuntary Servitude’ covers the most basic actions taken by traffickers to control their victims. Almost all traffickers confiscate travel documents to control and intimidate trafficking victims into remaining and not contacting law enforcement.

‘Accomplice liability’ is added to ensure that accomplices are subjected to the same penalties as the actors.

Penalties:

The penalties have been revised to conform with those contained in the VTVPA.

Sentencing Enhancements:

- The State Model Law does not include the death penalty (which is in the DOJ document). We do not support the death penalty and believe that the option of life imprisonment is more than adequate.

- The DOJ Model Criminal Statute only recommends an enhancement for time held in servitude. The annexed State Model Law includes enhancements for the time victims are held in involuntary servitude, forced labor or services, and sexual servitude of a minor.
- The State Model Law adds an enhancement for “vulnerable victims.”
- The DOJ Model Criminal Statute includes an enhancement only for cases involving minors in sexual servitude. The annexed State Model Law expands this provision to provide an enhancement in cases involving minors in involuntary servitude or forced labor or services.

Additional criminal provisions added:

- Plea of guilty or nolo contendere
- Inadmissible evidence - prior sexual history
- Prosecutorial immunity for victims in certain situations
- Asset forfeiture, which complements the section on restitution

Mandatory Restitution and Civil Remedy

The DOJ Model Criminal Statute does not cover all types of restitution that must be included. Nor does it spell out the procedures for ensuring implementation of restitution awards. This is a complicated and important issue for all victims of trafficking and so the State Model Law expands upon the DOJ language.

Benefits and Services to Trafficked Persons

The State Model Law includes many provisions relating to services and benefits for trafficked persons. The VTVPA contains extensive provisions addressing the needs of trafficked persons and members of the Freedom Network (USA) have a rich store of knowledge on what works and what trafficked persons need. The State Model Law reflects this experience.

Immigration

The provisions in the Immigration Division aim to ensure that trafficked persons are able to access their federal immigration rights under the VTVPA in all cases prosecuted at the state level.

Training, Task Force and Data Collection

This section ensures that local officials are educated and, where necessary, trained to identify and protect trafficked persons, to coordinate among branches of government and to gather relevant data on cases and prosecutions.

STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING*

April 2005

ORGANIZATION

This Act is organized into the following Divisions:

Division A: Purpose, Findings, and Definitions

Division B: Criminal Provisions

Division C: Mandatory Restitution and Civil Remedy

Division D: Benefits and Services to Trafficked Persons

Division E: Immigration

Division F: Training, Task Force and Data Collection

Division G: Authorization of Appropriations

DIVISION A: PURPOSE, FINDINGS AND DEFINITIONS

Section I. Purposes and Findings

(a) Purposes

The purposes of this chapter are to combat human trafficking, which is a contemporary manifestation of slavery, to ensure just and effective punishment of traffickers, and to protect the rights of trafficked persons.

(b) Findings

The State of _____ finds that:

[The legislature might consider incorporating relevant findings from the federal Victim of Trafficking and Violence Protection Act of 2000. Some of the most important provisions are set forth below, as well as other findings specifically relevant to state legislation.]

* The Model Statute was prepared by King & Spalding LLP, Global Rights, and Ayuda Inc. with the assistance of the Freedom Network (USA) members listed in the Annex.

(1) Existing legislation and law enforcement activities in [State] are inadequate to deter trafficking, to bring traffickers to justice and to protect the rights of trafficked persons. No comprehensive law exists in [State] that penalizes the range of offenses involved in the trafficking scheme or recognizes the needs and rights of trafficked persons. Instead, even the most brutal instances of trafficking are punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

(2) Existing state laws fail to protect victims of trafficking, who are often in the destination country without proper documentation and are frequently punished more harshly than the traffickers themselves.

(3) Trafficked persons often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes because they are typically unfamiliar with our laws, culture and language, are subjected to coercion and intimidation including physical or psychological control and debt bondage, and often fear retribution and forcible removal to countries in which they will face retaliation or other hardship,

(4) Adequate services and facilities do not exist in [State] to meet the needs of trafficking victims for health care, housing, education, and legal assistance, which safely support the recovery and ability of trafficked persons to regain control of their lives and also to assist with the prosecution of traffickers.

(5) To deter human trafficking and bring its perpetrators to justice and protect the rights of trafficked persons, the United States Congress passed the Victims of Trafficking and Violence Protection Act of 2000, and its amendments (VTVPA), the first comprehensive piece of legislation aimed at addressing the range of injustices perpetrated by traffickers.

(6) Likewise, to deter human trafficking, [State] must recognize that trafficking is a serious offense, which is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.

(7) States, including [State], must ensure that state anti-trafficking laws are compatible with the VTVPA and ensure, to the extent possible, that the victims have access to the rights and benefits available to them under the VTVPA, or to equivalent rights and benefits under state law.

Section 2. Definitions

In this chapter:

(a) "Actor" means a person who violates any of the provisions of Division B of this Act.

(b) "Blackmail" is to be given its ordinary meaning as defined by [State blackmail statute, if any] and includes, but is not limited to, a threat to expose any secret tending to subject any person to hatred, contempt, or ridicule.

(c) "Commercial sexual activity " means any sex act on account of which anything of value is given to, promised to, or received by any person.

(d) "Debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of

those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

(e) "Financial harm" includes (but is not limited to) credit extortion as defined by [State extortion statute, if any], criminal violation of the usury law as defined by [State statutes defining usury], or employment contracts that violate the Statute of Frauds as defined by [State statute of frauds].

(f) "Forced labor or services" means labor, as defined in (g) infra, or services, as defined in (k) infra, that are performed or provided by another person and are obtained or maintained through an actor:

(1) causing or threatening to cause serious harm to any person;

(2) physically restraining or threatening to physically restrain any person;

(3) abusing or threatening to abuse the law or legal process;

(4) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;

(5) using blackmail;

(6) causing or threatening to cause financial harm to any person or using financial control over any person; or

(7) using any scheme, plan, or pattern intended to cause any person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

(g) "Labor" means work of economic or financial value.

(h) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the trafficked person to perform such labor or service.

(i) "Minor" means a person under the age of 18 years.

(j) "Obtain" means, in relation to labor or services, to secure performance thereof.

(k) "Services" means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party. Commercial sexual activity and sexually explicit performances shall be considered "services" under this Act.

(l) "Sexually-explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(m) "Trafficked person," "victim of trafficking" and "trafficking victim" are used interchangeably means a person subjected to the practices set forth in Section 1, 2, 3 or 4 of Division B. In the case of a trafficked person who is a minor, incompetent, incapacitated, or deceased, the legal guardian of the trafficked person or a representative of the trafficked person's estate, another family member, next friend

or any other person appointed as suitable by the court may assume the trafficked person's rights, but in no event shall a defendant be named such representative or guardian.

(n) "Venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

DIVISION B. CRIMINAL PROVISIONS

Section 1. Trafficking of Persons for Forced Labor or Services

Whoever knowingly

(a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or

(b) benefits, financially or by receiving anything of value, from participation in a venture that has engaged in an act described in violation of Sections 2 or 3 of this Division,

shall, subject to the provisions of Section B.6 infra, be imprisoned for not more than 20 years.

Section 2. Involuntary Servitude

Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall, subject to the provisions of Section B.6 infra, be punished by imprisonment for not more than 20 years.

Section 3. Sexual Servitude of a Minor

Whoever knowingly subjects, or attempts to subject, or who recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, a minor knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute defining pornography]) or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography shall be punished by imprisonment as follows, subject to the provisions of Section B.6, infra:

(a) in cases involving a minor between the ages of [State age of consent] and 18 years, not involving force or threat of force, for not more than 20 years;

(b) in cases in which the minor had not attained the [State age of consent] years, not involving force or threat of force, for not more than 25 years; and

(c) in cases in which the violation involved a minor and also involved one or more of the elements listed in Division A, Sections 2(f)(1)–(7), for not more than 30 years.

Section 4. Unlawful Conduct with Respect to Documents in Furtherance of Trafficking or Involuntary Servitude

Anyone who knowingly destroys, conceals, removes, confiscates, or possesses, or attempts to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or other immigration document,

or any other actual or purported government identification document, of any person to prevent or restrict or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor or services of that person, when the person is or has been a victim of a violation set out in Division B, Sections 1, 2, and/or 3 shall be punished by imprisonment for not more than 5 years.

Section 5. Accomplice liability

Whoever knowingly aids, abets or conspires with one or more persons to violate Section 1, 2, 3 or 4 of this Division shall be punishable in the same manner as for a completed violation of that section.

Section 6. Sentencing Enhancements

(a) **Statutory Maximum.** If the violation of this Division involves death, an attempt to kill, kidnapping, attempted kidnapping, aggravated sexual abuse, or attempted aggravated sexual abuse, the defendant may be sentenced to any term of years or life.

(b) **Sentencing Considerations within Statutory Maximums.**

(1) *Bodily Injury.* If, pursuant to a violation of this Division, a trafficking victim suffered bodily injury, the sentence may be enhanced as follows:

(i) Bodily Injury, an additional ___ years of imprisonment;

(ii) Serious Bodily Injury, an additional ___ years of imprisonment; or

(iii) Permanent or Life-Threatening Bodily Injury, an additional ___ years of imprisonment.

(2) *Time held in Involuntary Servitude, Forced Labor or Services or Sexual Servitude of a Minor.* In determining sentences within statutory maximums, the sentencing court should take into account the time in which the trafficked person was held in involuntary servitude, forced labor or services or a minor was held in sexual servitude, with:

(i) an additional ___ years of imprisonment for cases in which the trafficking victim was held for between 180 days and one year, and

(ii) an additional _____ years of imprisonment for cases in which the trafficked person was held for more than one year.

(3) *Vulnerable victims.* If the defendant knew or should have known that a victim of the offense was a vulnerable victim, an additional _____ years of imprisonment may be imposed. A 'vulnerable victim' is a person who had no real or acceptable alternative but to submit.

(4) *Number of trafficking victims.* In determining sentences within statutory maximums, the sentencing court should take into account the number of trafficking victims, and may impose an additional _____ years of imprisonment in cases involving more than ten victims. If the offense involved a large number of vulnerable victims, an additional _____ years of imprisonment may be imposed.

(5) *Minors*. In determining sentences with statutory maximums, the sentencing court should take into account the age of the victim at the time the crime occurred and, in cases involving minors, shall provide increased sentences in cases involving convictions under section 1 or 2 of this Division as follows:

- (i) in cases involving a minor between the ages of 16 and 18 years, not involving force or threat of force, an additional ___ years may be imposed;
- (ii) in cases in which the minor had not attained the 16 years, not involving force or threat of force, an additional ___ years may be imposed; and
- (iii) in cases in which the violation involved a minor and also involved force or threat of force, an additional ___ years may be imposed.

Section 7. Plea of Guilty or Nollo Contendere by a Defendant

(a) Any plea of guilty or nollo contendere entered by a defendant charged with a crime under Section B.1, B.2, B.3, B.4 or B.5 of this Division must fully state the offenses that justify prosecution under the applicable state law.

(b) Any plea of guilty or nollo contendere entered under (a) will automatically entitle the victim of trafficking to all benefits and rights under this statute .

Section 8. Evidence generally inadmissible

The following evidence is not admissible in any civil or criminal proceeding under this Division:

- (a) Evidence offered to prove that any alleged trafficking victim engaged in other sexual behavior.
- (b) Evidence offered to prove any alleged trafficking victim's sexual predisposition.

Section 9. Prosecutorial Immunity

(a) Victims of trafficking will not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of, or incident or related to, being trafficked, such as entering the United States without inspection or documentation, using false documents, unlawful presence in the country, working without documentation, engaging in prostitution or drug possession.

(b) Victims of trafficking will not be held in detention centers, jail or prison at any time prior to, during, or after all civil, criminal or other legal proceedings.

Section 10. Asset Forfeiture

(a) The court, in imposing sentence on any person convicted of a violation of this Division or any person who enters a plea of guilty or nollo contendere under this Division, shall order, in addition to any other sentence imposed and irrespective of any other provision of [State] law, that such person shall forfeit to the [State] and such convicted person shall have no property right in –

- (1) Such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and

(2) Any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(b) The forfeited assets shall be disbursed in the following order:

(1) In satisfaction of court orders for restitution and/or compensation due to victims of trafficking;

(2) To fund trafficking victim services provided by state entities and non-profit organizations;

(3) To fund law enforcement efforts, including special units to investigate alleged trafficking cases, human rights and legal awareness training on trafficking, and witness protection programs for trafficking victims and witnesses; and

(4) To fund trafficking prevention measures.

DIVISION C. MANDATORY RESTITUTION AND CIVIL REMEDY

Section 1. Mandatory Restitution to Trafficked Persons

Restitution is mandatory under this Act when guilt under Division B has been determined by a plea of guilty or nolo contendere or by trial. In addition to any other amount of loss identified, and authorized by law, the court shall order restitution for the full amount of losses suffered by the victims of trafficking.

Section 2. Full amount of losses

“Full amount of losses” means:

(a) lost income, which in the case of a trafficked person includes the greater of

(1) the gross income or value to the defendant of the trafficked person’s labor or services or

(2) the value of the trafficked person’s labor as guaranteed under the minimum wage and overtime guarantees of the [State wage and hour] law or the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), whichever law results in the higher calculation of lost income;

(b) medical and related professional services relating to physical, psychiatric, or psychological care, including non-medical care and treatment rendered in accordance with a method of healing recognized by [State] law;

(c) physical and occupational therapy or rehabilitation;

(d) necessary transportation, temporary housing, and child care expenses;

(e) in the case of an offense resulting in damage or destruction of property, return of the property, or, if return is impossible, impracticable or inadequate, payment of the value of the property;

(f) in the case of an offense resulting in death, or bodily injury that results in death, the costs and expenses of necessary funeral and related services;

(g) attorneys' fees and other costs and expenses incurred, including those costs and expenses incurred that are related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(h) any other losses suffered by the person as a proximate result of the offense.

Section 3. Discretionary Restitution to Trafficked Persons

In the event mandatory restitution or other remedies are not available to a trafficked person, the court may impose an order of restitution when sentencing a defendant for any offense that is a crime of violence or in which an identifiable person or persons has suffered a physical injury or pecuniary loss, or in connection with the entering of a plea agreement or nullo contendere if agreed to by the parties, for any person for up to the "full amount of the losses" incurred by such person.

Section 4. Procedure for Issuance of Order of Restitution

(a) Pre-sentence Report

The court shall order the probation officer (with assistance from the attorney for [State] upon such officer's request) to obtain and include in its pre-sentence report information sufficient for court to exercise its discretion in fashioning a restitution order. The pre-sentence report shall include, to extent practicable: (1) a complete accounting of losses to each trafficked person; (2) any restitution owed pursuant to a plea agreement or nullo contendere; and (3) information relating to the economic circumstances of each defendant.

(b) Notice to Trafficked Persons

Before submitting the pre-sentence report (to the extent practicable), the probation officer shall provide notice to all identified trafficked persons of, among other things, the following: the amounts subject to restitution, the opportunity for the trafficked person to submit information concerning amount of losses, the availability of a lien in favor of the trafficked person, and the opportunity for the trafficked person to file with the probation officer a separate affidavit relating to amount of trafficked person's losses subject to restitution.

(c) Determination of Restitution Amount

(1) Any dispute as to proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. Burden of demonstrating amount of loss sustained by a trafficked person as a result of the offense shall be on the attorney for the State.

(2) In each order of restitution, the court shall order restitution to each trafficked person in accordance with the provisions of this Division as determined by the court and without consideration of the economic circumstances of the defendant; however, the court shall specify the manner in which and the schedule according to which the restitution is to be paid in consideration of the defendant's financial resources, projected earnings and dependents.

(3) If the trafficked person agrees, all or part of the restitution may be in the form of in-kind payments, such as real or personal property.

(4) Any amount paid to a trafficked person under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the trafficked person in any federal or state civil proceeding, to the extent provided by federal law or the law of such state.

Section 5. Enforcement of Order of Restitution

(a) Enforcement, Generally

An order of restitution may be enforced by the state by all available and reasonable means.

(b) Lien

An order of restitution shall be deemed a lien in favor of the State on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the [State] Revenue Code. At a trafficked person's request, the clerk shall issue an abstract of judgment certifying that a judgment has been entered in favor of such trafficked person in the amount specified and, upon registering, recording, docketing or indexing such abstract, the abstract of judgment shall be a lien on the property of the defendant.

(c) Satisfaction of Unpaid Fine or Restitution

The State may enforce judgment imposing a fine or restitution in accordance with the practices and procedures for enforcement of a civil judgment, and such judgment may be enforced against all property or rights to property of the person fined or ordered to pay restitution, with those limited exceptions imposed by State or Federal law.

(d) Resentencing; Imprisonment Upon Failure to Pay a Fine or Restitution

If defendant knowingly fails to pay a delinquent fine and/or restitution, the court may resentence the defendant to any sentence which might originally have been imposed. The defendant may be sentenced to a term of imprisonment only if the court determines that (1) defendant willfully refused to pay the fine or failed to make sufficient bona fide efforts to pay the fine, or (2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence, provided in each case that imprisonment shall not be more than one year.

(e) Increase in Fine or Restitution for Willful Failure to Pay

If defendant, having been sentenced to pay a fine or restitution, willfully fails to pay the fine or restitution, the court may fine such person the greater of (1) an amount not more than twice the unpaid balance of the fine or restitution, or (2) \$10,000.

Section 6. Civil Action

(a) A trafficked person may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damage where defendant's acts are willful and malicious.

(b) An action brought pursuant to this section shall be commenced within ten years of the date on which the trafficked person was freed from the trafficking situation, or if the trafficked person was a minor when the act occurred, within fifteen years after the date the plaintiff attains the age of 18.

(1) Disability will “toll” or suspend the running of the statute. If a person entitled to sue is under a ‘disability’ at the time the cause of action accrues, such that it is impossible or impracticable for her or him to bring an action, the time during which the plaintiff is under a disability tolls the running of the time limit for the commencement of the action. Disability includes: Insanity, imprisonment or other incapacity or incompetence

(2) Statute will not run against an incompetent or minor plaintiff simply because a guardian ad litem has been appointed. In the event that a minor plaintiff is under a disability, the failure of the minor’s guardian ad litem to bring a plaintiff’s action within the applicable limitation period will not prejudice the plaintiff’s right to do so after his or her disability ceases.

(3) Estoppel. A defendant is estopped from asserting a defense of the statute of limitations when the expiration of the statute is due to:

(i) conduct by the defendant inducing the plaintiff to delay the filing of the action, or preventing the plaintiff from filing the action, or

(ii) threats made by the defendant that caused duress upon the plaintiff.

(4) The suspension of the statute of limitations due to disability or estoppel applies to all other related claims arising out of the trafficking situation.

(c) In this subsection, a ‘criminal action’ includes investigation and prosecution and remains pending until final adjudication in the trial court.

(d) Any legal guardian, family member, representative of the trafficked person, or court appointee may represent the trafficked person’s rights, in the event the trafficked person is deceased or otherwise unable to represent his or her own interests in court.

DIVISION D: BENEFITS AND SERVICES TO TRAFFICKED PERSONS²

Section 1. Definitions

For purposes of this Division:

(a) “Services” refers to those services provided to trafficked persons and family members of trafficked persons. Provision of such services shall not be contingent on the trafficked person’s immigration status or on the prosecution of the trafficking victim’s trafficker.

² Existing state laws may have services for crime victims that may be cross-referenced in the model state legislation, *e.g.*, domestic violence statutes; crime victim’s access to legal services; and social services and medical care for crime victims.

(b) “Responsible Official” refers to the state official(s), agency or board designated to oversee the provision of services and benefits to trafficked persons and family members of trafficked persons as described herein.

(c) “Local service provider” refers to legal entities at the regional, city, or county level that offer benefits and services to trafficked persons.

Section 2. Services

(a) *Eligibility For Benefits And Services.*-- Notwithstanding any local or state law limiting the ability of an alien to access [State or local] benefits or services, an alien who is a victim of trafficking shall be eligible for benefits and services under any State or local program, including the [State] Crime Victim Compensation Program³ or activity funded or administered by any official or agency described in subparagraph (b).

(b) *Requirement to Expand Benefits and Services.* -- Subject to subparagraph (c) and, in the case of non entitlement programs, to the availability of appropriations, the [insert State officials responsible for health, welfare, labor, and legal services], the heads of other state agencies, and local service providers are hereby authorized to provide benefits and services to trafficked persons in [State], without regard to the immigration status of such trafficked persons or the ability or willingness of the trafficked person to participate in the investigation or prosecution of her or his trafficker.

(c) *Certification of Eligibility for Trafficked Persons.* -- Within 96 hours of a state or local official having identified the presence of a trafficked person with the [State], the Responsible Official will review and evaluate the case of the trafficked person, including any attendant crime report, and issue a letter of certification of eligibility or other relevant document entitling the trafficked person to have access to [State] Crime Victim Compensation funds and other state benefits and services.

Section 3. Protections While in Custody

(a) Trafficked persons, while in custody of a Responsible Official, shall:

- (1) not be detained in facilities inappropriate to their status as crime victims;

³ (1) Federal Funds: The 1984 Victims of Crime Act (VOCA) established the Crime Victims Fund in the U.S. Treasury. This Fund receives fines, penalty assessments, and bond forfeitures from convicted Federal criminals, not taxpayers. It is administered by the Office for victims of Crime (OVC) and helps to support State compensation programs for crime victims. (2) State funds: All 50 States, the District of Columbia, the Virgin Islands, and Guam have established compensation programs. Each of these programs reimburse victims of violent crime for expenses such as lost wages and medical, counseling, and funeral costs that are not covered by other resources such as medical insurance or offender restitution. Although each State compensation program is administered independently, most programs have similar eligibility requirements and offer a comparable range of benefits. Maximum awards generally range between \$10,000 and \$25,000. Some States have higher or lower award limits. Certain expenses are not covered by most compensation programs. These include property loss, theft, and damage. To be eligible to receive compensation, victims must comply with State rules, which generally require that they cooperate with the reasonable requests of law enforcement and submit a timely application with the State compensation program. Additionally, some states require that one proves that one is legally allowed to be in the United States. This causes problems for many trafficked victims who are undocumented and are thus barred from receiving benefits under the State Crime Victim Compensation Program.

- (2) receive necessary medical care and other assistance; and
 - (3) be provided law enforcement protection if her or his safety is at risk or if there is a danger of harm by recapture of the trafficked person by a trafficker, including:
 - (i) taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals and reprisals from traffickers or their associates; and
 - (ii) ensuring that the names and identifying information of trafficked persons and their family members are not disclosed to the public.
- (b) Where appropriate, Responsible Officials shall employ civil procedures, including application for temporary restraining orders and protective orders, while protecting trafficking victims and witnesses, and their family members.

Section 4. Access to Rights, Benefits, and Services

Trafficked persons shall be provided with information about their rights and applicable services, including:

- (a) right to pro bono and low-cost legal services;
- (b) right to access federal and state benefits and services, such as regularized immigration status, benefits and services under the Victims of Trafficking and Violence Protection Act of 2000, as amended, state compensation, assistance, education and training programs;
- (c) names and contact information about relevant local service providers offering services to victims of trafficking and, when relevant, to domestic violence and rape crisis centers;
- (d) the availability of federal and state protections for victims and witnesses (and their families) faced with threats and intimidation,
- (e) legal remedies available, including restitution and compensation in civil and criminal proceedings;
- (f) right to privacy and confidentiality;
- (g) right to receive notices about status of the case against the trafficker(s); and
- (h) right to access translation services and/or an oral interpreter if the trafficked person cannot communicate fully in English.

Section 5. Medical and Related Professional Services

Recommendation: Legislators should ensure that state law ensures that trafficking victims are able to access all of the services necessary for them to recover from their injuries and trauma. State law should provide for medical and other services, including the following:

(a) Physical Health

- (1) Victims should be provided necessary medical and dental care and other assistance.

(2) Victims of sexual assault should be provided:

- i) free optional confidential testing for HIV and other sexually transmitted diseases; and
- ii) a counseling session by a medically-trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases.

(b) Mental Health - Trafficked persons should be provided mental health counseling to address the psychological trauma associated with human trafficking.

(c) Occupational Therapy - Trafficked persons shall receive necessary and appropriate occupational therapy services.

Section 6. Social and Other Services

Recommendation: State laws should ensure that all trafficked persons, whose needs are extensive, have access to comprehensive social and other services necessary for recovery and reintegration, including:

- (a) Language translation services and counseling in the trafficked person's native language or language of fluency,
- (b) Temporary Assistance to Needy Families (TANF), and other [State] or federal welfare benefits,
- (c) Transportation,
- (d) Appropriate and safe housing,
- (e) Child care,
- (f) Education/language training,
- (g) Employment assistance/training,
- (h) Job placement services, and
- (i) Opportunities for employment, education and training.

Section 7. Legal Services and Protections

(a) Trafficked persons will be provided with free legal counsel to:

- (1) pursue civil actions against his or her traffickers,
- (2) represent her/his interests in any criminal investigation and/or prosecution, and
- (3) assist with applications for immigration benefits and/or regular immigration status.

(b) Trafficked persons and prosecution witnesses, and their families, will be protected from intimidation and retaliation by traffickers and their associates and shall have access to the [state] Witness Protection Program and centers for victim and witness assistance and the [state] Victim-Witness Assistance Fund.

Section 8. Creation of Shelter Programs

(a) [State] shall establish shelter(s) specifically for the protection and housing of trafficked persons. Each shelter shall be designed to provide the following basic services to trafficked persons:

- (1) Shelter operating 24 hours a day, seven days a week,
- (2) A switchboard for crisis calls operating 24 hours a day, seven days a week,
- (3) Temporary housing and food facilities,
- (4) Psychological support and peer counseling,
- (5) Referrals to existing services in the community and follow-up on the outcome of the referrals, and
- (6) Emergency transportation to the shelter and, when appropriate, arrangements with local law enforcement for assistance in providing such transportation.

(b) The shelters shall be funded by state-level efforts to coordinate application for federal funds designated for the support of victims of trafficking and additional funds that the Legislature shall see fit to earmark for this purpose.

Section 9. Privileged Relationship

[In the appropriate section of the [state] code of evidence that provides for privileges, add 'trafficking victim counselor' to the list of professionals who have a privileged relationship with their clients.]

As used in this section, a "trafficking victim counselor" means any of the following:

(a) A person who is engaged in any office, hospital, institution, or center whose primary purpose is the rendering of advice or assistance to victims of human trafficking and who meets one of the following requirements:

- (1) Is a psychotherapist as defined in Section ____; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of human trafficking victims.
- (2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but need not be limited to, the following areas: history of human trafficking, civil and criminal law as it relates to human trafficking, societal attitudes towards human trafficking, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of human trafficking victims, and referral services available to human trafficking victims.

(b) A person who is employed by any organization providing programs, whether financially compensated or not, for the purpose of counseling and assisting human trafficking victims, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section ____; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape assault counseling.

(2) Has the minimum training for counseling of human trafficking victims as required by guidelines established by the employing agency and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas: law, victimology, counseling techniques, client and system advocacy, and referral services.

Section 10. State Crime Victim Compensation Funds

(a) Trafficked persons are entitled to seek relief under the [State] Crime Victim Compensation Fund.

(b) An application for a claim based on having been a victim of trafficking may not be denied solely because no police report was made by the trafficked person.

(c) The Crime Victim Compensation Board shall adopt guidelines that allow the Board to consider and approve applications for assistance based upon evidence other than a police report to establish that an applicant had been a victim of trafficking. Such evidence may include, but is not limited to documentation submitted to support the trafficked person's application for T nonimmigrant status, letters from caseworkers, and sworn affidavit from the applicant, or the applicant's friends, family, or other public contacts familiar with the circumstance of the incident. Such parties as may provide this evidence include but are not limited to teachers, medical professionals, or religious leaders.

DIVISION E: IMMIGRATION⁴

Section 1. Assisting Trafficked Persons to Secure Immigration Status and Federal Benefits

To ensure that trafficking victims are able to access all available federal benefits and programs for trafficked persons (who are called "victims of a severe form of trafficking" under the Victims of Trafficking and Violence Protection Act of 2000, as amended (VTVPA)), the relevant state law enforcement agency (SLEA) officials shall:

(a) keep federal authorities informed about trafficking cases in the State;

(b) within 72 hours of determining that, more likely than not, an immigrant was a victim of trafficking, and upon the written request from the trafficked person or her or his legal representative, submit a written request to the appropriate federal authorities requesting that the trafficking victim be granted the temporary immigration status known as "continued presence" under the VTVPA;

⁴ As an almost exclusive area of federal law, immigration issues are unique and the federal government seeks to retain as much discretion as possible in determining immigration status. Although states have little independent authority to make such determinations on their own, there are a number of ways in which a state can assist the federal government in reaching a determination to provide protection to victims of trafficking.

(c) within 72 hours of a written request for documentation from a person identified by local or state authorities as someone who had, more likely than not, been a victim of trafficking or a written request from her or his legal representative, provide the person with a completed form Supplement B to Form I-914, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons that satisfies the Law Enforcement Agency (LEA) Endorsement regulations in Chapter 8 of the Code of Federal Regulations sec. 214.11(f)(1) in support of such person's application for the T non-immigrant status⁵ or the U non-immigrant status available to victims of trafficking under the VTVPA;

(d) within 72 hours of a request for documentation from a person identified by local or state authorities as someone who had, more likely than not, been a victim of trafficking, or a written request from her or his legal representative, provide the person with documents in support of such person's request for benefits and services authorized by the VTVPA to be provided to trafficking victims by the Office of Refugee Resettlement in the Department of Health and Human Services.

Section 2. Non-Referral to Immigration for Removal or Deportation

No state or local official shall transmit, in any form, any information identifying, in any way, the name or location of a trafficked person to federal immigration officials responsible for removal or deportation of undocumented aliens.

DIVISION F. TRAINING, TASK FORCE AND DATA COLLECTION

Section 1. Training to Identify and Protect Trafficking Victims

Training shall be made available in all relevant local and state agencies, including, but not limited to, healthcare, hospital, law enforcement, labor, agriculture, housing, and social service, to:

- (a) educate officials on the phenomenon of human trafficking, state and federal laws on human trafficking, the rights and needs of trafficked persons, and the tools necessary to provide effective services to trafficked persons;
- (b) how to recognize and identify trafficking victims;
- (c) methods for protecting trafficking victims and advising them of their rights; and
- (d) procedures and techniques for handling specialized needs of victims who may face cultural, language and other barriers that impede ability to request and obtain available services.

⁵ To be eligible for a T visa, trafficking victims must meet certain criteria, including: (a) he or she is or has been a of a severe form of trafficking as defined under the TVPA; (b) he or she is physically present in the United States (or other U.S. territories) on account of such trafficking; (c) he or she has complied with reasonable requests for help in the investigation or prosecution of traffickers or has not reached the age of 15; and (d) he or she would suffer extreme hardship involving unusual or severe harm upon removal from the U.S.

Section 2. Establish State Interagency Anti-Trafficking Task Force

(a) The Governor shall establish a State Interagency Anti-Trafficking Task Force to be comprised of officials from [insert State official responsible to Health and Welfare, Labor, and Legal Services], officials from other appropriate state agencies, and representatives from local service providers.

(b) Activities of the Task Force.--The Task Force shall carry out the following activities:

(1) Coordinate the implementation of this Division.

(2) Coordinate the implementation of Division E (Immigration), including developing protocols and training individuals within designated state agencies, nongovernmental organizations, and private entities to provide data collection services and immigration resources to trafficked persons.

(3) Measure and evaluate progress of the State in the areas of trafficking prevention, protection, and assistance to victims of trafficking, and prosecution and enforcement against traffickers.

(4) Expand interagency procedures to collect and organize data, including significant research and resource information on domestic trafficking. Any data collection procedures established under this subsection shall respect the confidentiality of trafficking victims.

(5) Engage in federal efforts to facilitate cooperation among countries of origin, transit, and destination. Such efforts shall aim to strengthen local and regional capacities to prevent trafficking, prosecute traffickers and assist trafficking victims, and shall include initiatives to enhance cooperative efforts between destination countries and countries of origin.

(6) Engage in consultation and advocacy with governmental and nongovernmental organizations, among other entities, to advance the purposes of this Division and Division E (Immigration).

(c) Support for the Task Force.--The [designated State official] is authorized to designate a Director of the Task Force. The Director shall have the primary responsibility for assisting the Task Force in carrying out the purposes of this Division and may have additional responsibilities as determined by the [designated State official]. The Director shall consult with non-governmental organizations, multilateral organizations, and trafficking victims or other affected persons. The Director shall have the authority to take evidence in public hearings or by other means.

(d) The Interagency Anti-Trafficking Task Force is authorized to seek Federal grants available to states, local government, non-profit organizations for services programs under the federal Victim of Trafficking and Violence Protection Act of 2000, as amended.

(e) Annual Report. Not later than December 31 of each year, the [State] Interagency Anti-Trafficking Task Force shall submit a report, which includes information on the progress of the State in the areas of trafficking prevention, protection, and assistance to victims of trafficking, and prosecution and enforcement against traffickers and the number of persons who received benefits or other services under this Act in connection with programs or activities funded or administered by such agencies or officials during the preceding fiscal year, to the governing committees of the both chambers of the [State] Legislature.

Section 3. Protocols and Training for State Law Enforcement Agency Officers

Each state shall establish protocols and training for State Law Enforcement Agency Officers to assist trafficked persons in accessing non-immigrant status and federal benefits, including mechanisms for coordinating with the federal officials to ensure that trafficked persons are able to access their rights under federal law.

Section 4. Data Collection

(a) The Office of the State Attorney General shall, on or before June 30 of each year, submit a report to the United States Attorney General, with respect to the preceding fiscal year, the number, if any, of otherwise eligible applicants who did not receive visas under section 101(a)(1)(5)(T) of the Immigration and Nationality Act, or who were unable to adjust their status under section 245(l) of such Act, solely on account of the unavailability of visas due to the limitation imposed by section 214(n)(1) or 245(l)(4)(A) of such Act.

(b) The relevant state authorities shall also collect data on trafficking cases, including:

(1) the number of trafficked persons who received and the number of trafficked persons who were refused:

i) Continuous physical presence status,

ii) T non-immigrant visas, and/or

iii) federal benefits from the Department of Health and Human Services

(2) the number of cases investigated;

(3) the number of prosecutions under Division B;

(4) the number of convictions under Division B and plea bargains; and

(5) the age, sex and nationality of the trafficking victims and defendants in all cases prosecuted.

Section 5. Creation of a Resource Center

(a) The agency or agencies designated by the [Director of Finance] shall develop and disseminate throughout the state information and materials concerning human trafficking, including, but not limited to, a procedures manual on the identification and prevention of human trafficking. The agency or agencies designated by the [Director of Finance] shall also establish a resource center for the collection, retention, and distribution of educational materials related to human trafficking.

(b) The programs created in subdivision (a) shall be developed consistent with the availability of funds from the federal government for human trafficking prevention and education.

Section 6. Creation of a Liaison to the Department of Justice

The Attorney General shall establish a liaison with the United States Department of Justice in order to harmonize the State's response to human trafficking with the federal government's response to

trafficking. This liaison shall:

(a) facilitate the legal processes over which the federal government has sole authority, including, but not limited to, those processes through which overseas family members of trafficked persons can receive protection from the United States Government,

(b) advise the Attorney General of all federal funding that may be available for implementing the various elements of the state's responses to human trafficking, with particular attention to shelter funding and

(c) endeavor, in conjunction with non-governmental organizations, to secure federal documents enabling trafficked persons to have access to federal benefits and services.

DIVISION G: AUTHORIZATION OF APPROPRIATIONS

(a) Authorization of Appropriations to State Attorney General.-- To carry out the purposes of Division B, there is authorized to be appropriated to the State Attorney General \$_____ for fiscal year 200_ and \$_____ for fiscal year 200_.

(b) Authorization of Appropriations to the Departments [having responsibility to investigate crimes and labor violations], there is authorized to be appropriated to [relevant department] \$___ for the fiscal year 200_ and \$___ for fiscal year 200_ and to [relevant department] \$___ for the fiscal year 200_ and \$___ for fiscal year 200_.

(c) Authorization of Appropriations to the [State official responsible for Health And Human Services]-- To carry out the purposes of Division D, there is authorized to be appropriated to the [State official responsible for Health and Human Services] \$_____ for fiscal year 200_ and \$_____ for fiscal year 200_.

(d) Authorization of Appropriations in Support of the Training, Task Force and Data Collection.--To carry out the purposes of Division F, there is authorized to be appropriated to the [designated State official] \$_____ for fiscal year 200_ and \$_____ for fiscal year 200_.

STATE LEGISLATORS' GUIDE TO THE FEDERAL VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 AND THE TRAFFICKING REAUTHORIZATION ACT OF 2003*

April 2005

SUMMARY

The Victims of Trafficking and Violence Protection Act (VTVPA) is the first comprehensive federal law to address human trafficking. It establishes a strong criminal law to ensure the prosecution of all human traffickers and it establishes programs to prevent human trafficking and provide services for, and protect the rights of, trafficked persons. State anti-trafficking legislation should complement the broad scope of federal provisions and ensure that victims in state-level trafficking cases are able to access the same rights and benefits that are available for victims in federal-level trafficking cases. The main provisions of the VTVPA are introduced below.

PROSECUTION OF TRAFFICKERS

The VTVPA strengthens the ability of federal law enforcement to prosecute and punish traffickers by creating three new federal crimes to supplement the slavery, involuntary servitude and peonage laws already in existence:

Trafficking – Criminalizes the recruitment, harboring, transportation, provision, or obtainment, by any means, of any person for peonage, slavery, involuntary servitude, or forced labor.

Forced Labor – Criminalize the provision or obtainment of labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another; (2) by means of any scheme, plan, or pattern intended to cause that person to believe that s/he or another person would suffer serious harm; or (3) by abusing or threatening to abuse the law or legal process.

Sex Trafficking – Criminalizes the recruitment, enticement, harboring, transportation, provision or obtainment by any means of a minor for any commercial sex act and of an adult if force, fraud or coercion is involved.

The VTVPA also unifies federal *penalties* for trafficking and the trafficking-related crimes of forced labor, involuntary servitude, slavery, and peonage. These crimes are now punishable with imprisonment for up to twenty years or up to life in cases involving aggravating circumstances.

Persons convicted of trafficking, forced labor, involuntary servitude, slavery or peonage must *forfeit* their assets.

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PROTECTION AND ASSISTANCE FOR VICTIMS OF TRAFFICKING

The VTPA contains two definitions of trafficking in the criminal section (discussed above) and another one in the non-criminal sections relating to protections and services. The definitions are similar but not the same. One definition of trafficking is used to determine who is eligible for regularized immigration status, work authorization, witness protection (if necessary), social service benefits and legal referrals. This definition, which is called “severe form of trafficking in persons” is:

- the recruitment, harboring, transportation, provision, or obtaining of a persons for the purpose of a commercial sex act when that act is induced by force, fraud, or coercion, or when the person induced to perform such act is a minor; or
- 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.

Immigration Status

Continued Presence - If necessary to aid in the investigation or prosecution of a trafficking case, the Department of Homeland Security may grant ‘continued presence,’ which allows the trafficked person to remain in the country temporarily and have access to social and other services and obtain work authorization.

T-visa - Trafficked persons may also petition for a “T-visa”, which allows victims of trafficking to remain in the country for a period of up to three years. T-visa holders can access social and other services and obtain work authorization. T-visa holders may also petition for permanent residence and request authorization for certain family members to join them.

Social and Other Services

Trafficked persons with continued presence or T-visa status can be certified by the Department of Health and Human Services to receive refugee benefits.

Trafficked persons must be provided with appropriate shelter, necessary medical care, access to information about their rights and translation services.

Witness Protection and Civil Actions

The VTPA also ensures that trafficked persons and their families have access to the federal witness protection program, if necessary. Trafficked persons may bring civil actions against their traffickers and have the right to mandatory restitution in criminal cases.

THE FULL TEXT OF THE GUIDE FOLLOWS

STATE LEGISLATORS' GUIDE

INTRODUCTION

The Victims of Trafficking and Violence Protection Act (VTVPA) approaches human trafficking through a three-tiered approach of prosecution, protection, and prevention.⁶ The law strengthens the ability of the federal government to combat human trafficking by creating new crimes and increasing penalties for traffickers, including asset forfeiture and restitution for victims. The law also provides explicit protections to trafficked persons, including immigration status, social service benefits, and specific legal rights. It also funds prevention programs for countries of origin.

In addition, the VTVPA calls for collaborations between NGOs and the federal government in creating preventive strategies and increasing awareness of trafficking, thus recognizing that effective actions require civil society cooperation. To ensure effective implementation, the VTVPA authorizes Congress to appropriate funds for government and NGO activities.

PROSECUTION OF TRAFFICKERS

State legislators who are drafting anti-trafficking laws should understand the VTVPA and benefit from the years of experience at the federal level in prosecuting trafficking cases before and after the VTVPA came into effect. State laws should contain all of the elements, but need not mimic the language, of the federal law. In order to ensure that state trafficking victim-witnesses receive federal benefits, such as immigration status, refugee benefits, it is extremely important for state laws to be consistent with federal law.

Before the passage of the VTVPA, traffickers were prosecuted under federal statutes created to enforce the Thirteenth Amendment outlawing slavery and involuntary servitude.⁷ These statutes, however, did not address the full panoply of offences associated with trafficking and the penalties were not appropriate considering the severity of the crime.⁸ Additionally, the Supreme Court in a pre-VTVPA case found that, absent a Congressional definition of involuntary servitude that explicitly includes psychological coercion, the crime of involuntary servitude only covers crimes that include the use or threat of the use of physical restraint or injury or the use or threat of the law or legal process.⁹ This clearly does not include the use of psychological coercion, which many traffickers use to keep their trafficking victims compliant, and thus prevented federal prosecutors from prosecuting many traffickers under the involuntary servitude statute.

The VTVPA corrected this gap in the law by creating the new federal crime of *forced labor*, which criminalizes individuals who “obtain the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) *by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that*

⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. Law No. 106-386, §§ 101-111; Trafficking Victims Protection Reauthorization Act of 2003, Pub. Law No. 108-193.

⁷ See Michael R. Candes, *The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-First Century?*, 32 U. MIAMI INTER-AM. L. REV. 571 (2001).

⁸ *Id.* See also 22 U.S.C.A. § 7101(b)(14).

⁹ United States v. Kozminski, 487 U.S. 931 (1988); See also 22 U.S.C.A. § 7101(b)(13).

person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.”¹⁰

The VTVPA also added other new criminal provisions. It:

- Criminalizes the crime of *trafficking*: “Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services: in peonage, slavery, involuntary servitude, or forced labor;”¹¹
- Criminalizes *sex trafficking*: “Whoever knowingly
(1) ...recruits, entices, harbors, transports, provides, or obtains by any means a person; or
(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion will be used to cause the [adult or child] to engage in a commercial sex act, or that the person [is a minor under 18] and will be caused to engage in a commercial sex act.”¹²
[*Note* Traffickers of adults under this section could also be prosecuted under the crime of ‘trafficking’; the same penalties are available in both crimes with respect to adults.]
- *Increases and unifies penalties.* Trafficking, slavery, forced labor, involuntary servitude and peonage are now punishable with a fine or imprisonment for up to twenty years.¹³ In cases involving aggravating circumstances, such as death, kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the punishment increases to imprisonment for any term of years or up to life.¹⁴
- Criminalizes the *restriction or attempted restriction of a person’s movement*, in order to maintain that person’s labor or services, by destroying, concealing, removing, confiscating, or possessing that person’s actual or purported passport, immigration document, or other government identification.¹⁵
- Mandates the *forfeiture* of any property or assets used, or intended to be used, in the course of trafficking or any property or assets derived from trafficking.¹⁶

PROTECTION AND ASSISTANCE FOR TRAFFICKED PERSONS

Persons who meet the definition of “*victims of severe forms of trafficking*” in the VTVPA are eligible for regularized immigration status, social service benefits, and certain legal rights. The definition of “severe forms of trafficking” is not exactly the same as the definition of ‘trafficking’ or ‘sex trafficking’ in the criminal sections of the VTVPA. However, it covers the same elements and is defined as:

¹⁰ 18 U.S.C. § 1589.

¹¹ 18 U.S.C. § 1590.

¹² 18 U.S.C. § 1591.

¹³ Pub. Law No. 106-386, § 112(a).

¹⁴ *Id.*

¹⁵ 18 U.S.C. § 1592.

¹⁶ 18 U.S.C. §1594(b).

- The recruitment, harboring, transportation, provision, or obtaining of a persons for the purpose of a commercial sex act when that act is induced by force, fraud, or coercion, or when the person induced to perform such act is a minor; or
- 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 subsection to involuntary servitude, peonage, debt bondage, or slavery.¹⁷

The law requires federal officials to receive training to identify trafficked persons and to provide them with the protections available under the law.¹⁸

Immigration Status

A crucial component in supporting and protecting the recovery of undocumented trafficked persons and in encouraging them to testify against their traffickers is the availability of regularized immigration status. Legal status lifts the victims out of legal limbo and allows them to begin regaining control over their lives. Federal prosecutions have been highly successful in prosecutions when the victims have been safe and secure, both psychologically and physically. State prosecutions will require no less.

State legislators will have to consider the impact that state prosecutions of cases that would otherwise be prosecuted at the federal level can have upon trafficked persons. One of the main difficulties that states will face is how to ensure that witnesses and other undocumented trafficked persons in state cases will have access to the same right to regularized immigration status that is available in federal cases. Legislators should consider how to draft state laws that support victims' applications to regularize their immigration status. For example, legislators may consider mandating that state and local law enforcement agencies provide all necessary documentation in support of a trafficked person's application for regularized immigration status, such as statements certifying that, according to federal law, a person is a "victim of a severe form of trafficking" and has complied with reasonable requests for assistance in the investigation or prosecution of traffickers.

The following discussion briefly outlines the two main forms of regularized immigration status provided to trafficked persons under the VTVPA.¹⁹ Trafficked persons may obtain a temporary legal status called "*continued presence*" and a non-immigrant visa under the Immigrant and Nationality Act (INA) called a "*T-visa*."

Continued Presence. If an undocumented trafficked person's presence in the United States is necessary for federal investigation or prosecution efforts, the Department of Homeland Security may grant him or her "*continued presence*."²⁰ Continued presence is a temporary form of relief that allows trafficked persons to remain only so long as the Attorney General determines that his or her presence within the United States is necessary. It is renewable for the duration of the criminal investigation and trial. Continued presence grants legal status in the United States and work authorization. This status cannot be

¹⁷ 22 U.S.C. § 7102(8).

¹⁸ 22 U.S.C. § 7105(c)(4).

¹⁹ Trafficked persons may also seek asylum or other forms of immigration relief.

²⁰ 22 U.S.C. § 7105(c)(3).

adjusted to permanent residency in the United States and, at the expiration the status, the person must apply for another immigration status or leave the United States.²¹

T-Visa. A trafficked person may petition the Department of Homeland Security for a T-visa, which is valid for three years and is not renewable. This status grants a person legal immigration status in the United States and authorizes the T-visa holder to obtain a work permit. T-visa holders may apply for permanent residency after a period of three years.²² They may also petition to bring certain family members to join them.²³

To be eligible for a T-visa, a trafficked person must

- Be a “victim of a severe form of trafficking in persons;”
- Be physically present in the United States or at a port of entry on account of such trafficking;
- Have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, unless the trafficked person is under 18 years of age; and
- Would suffer extreme hardship involving unusual and severe harm if removed.²⁴

A trafficked person must make a good faith attempt to obtain a federal Law Enforcement Agency (LEA) endorsement to serve as evidence that she or he is a “victim of a severe form of trafficking.”²⁵ The LEA endorsement is “primary evidence” of victim status. In the absence of an LEA endorsement, a trafficked person may submit documentation from the Bureau of Immigration and Customs Enforcement (ICE) showing that she or he has been granted “continued presence,” which also serves as primary evidence. Absent these two forms of documentation, a trafficked person may submit “secondary evidence” of victim status, which includes affidavits from *state and local law enforcement agencies*.

To prove physical presence in the United States, a trafficked person must submit statements regarding entry into the country and demonstrate that she or he is present because of trafficking.²⁶ If the trafficked person escaped the traffickers before law enforcement became involved, then the person must also show that she or he did not have a “clear chance to leave the United States” in the period after escape but prior to law enforcement involvement.²⁷

Trafficked persons age 18 and over must provide evidence that they have complied with any reasonable request for assistance in the investigation or prosecution of trafficking. These requirements can be met with affidavits of *state or local law enforcement officials* regarding the facts being alleged regarding the

²¹ 22 U.S.C. § 7105(b)(1)(E)(ii). Only those holding T-visas may have their status adjusted. See 8 U.S.C. § 1255(l).

²² 8 U.S.C. § 1255(l).

²³ 8 C.F.R. § 214.11(o)(1). See discussion below.

²⁴ 8 U.S.C. § 1101(a)(15)(T).

²⁵ 8 C.F.R. § 214.11(f)(3). LEA endorsements may be obtained from the U.S. Attorneys’ Offices, the Civil Rights and Criminal Divisions, the Federal Bureau of Investigation (FBI), the U.S. Immigration and Customs Enforcement (ICE), and the U.S. Marshals Service. 8 C.F.R. § 214.11(a). The Diplomatic Security Service in the U.S. State Department is also a federal law enforcement agency. *Id.*

²⁶ 8 C.F.R. § 214.11(g)(1).

²⁷ 8 C.F.R. § 214.11(g)(2).

above three points.²⁸ State legislation should require state and local officials to assist with the documentation necessary to support these applications.

T-visa applicants under the age of 18 do not need to provide evidence that they complied with any reasonable request for assistance in the investigation and prosecution of trafficking.

Finally, an applicant must show that she or he would suffer extreme hardship involving unusual and severe harm if removed from the United States, which is a very high standard.²⁹ The Department of Homeland Security will consider all evidence submitted to meet this standard.³⁰

Reunification with Family Members. T-visa holders over the age of 21 may request the Department of Homeland Security to allow certain members of their immediate families – spouses and children – to join them in the United States.³¹ Also eligible to join trafficked persons under the age of 21 are parents and unmarried siblings under 18.³² The Department of Homeland Security will grant reunification requests only if the government determines that the presence of these family members is necessary to avoid extreme hardship.³³ State and local law enforcement officials should be required to support the applications of trafficked persons who meet these criteria.

Permanent Residency. Trafficked persons and family members who have been admitted into the United States under the TVPA may apply to adjust their immigration status to that of a legal permanent resident.³⁴ To qualify for *adjustment of status*, a trafficked person:

- Must have been physically present in the United States for a continuous period of at least three years since holding the T-visa;
- Must have been of good moral character throughout that period; and
- Must have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or
- Would suffer extreme hardship involving unusual and severe harm upon removal from the United States.³⁵

The Department of Homeland Security may grant only 5,000 T-visas per year and may only adjust the immigration status of 5,000 T-visa holders per year.³⁶

²⁸ *Id.*

²⁹ 8 C.F.R. § 214.11(i)(1).

³⁰ 8 C.F.R. § 214.11(i)(3).

³¹ 8 C.F.R. § 214.11(o)(1).

³² 8 U.S.C. § 1101(a)(15)(T)(ii).

³³ *Id.* See also 8 C.F.R. § 214.11(o)(1).

³⁴ 8 U.S.C. § 1255(l). A trafficked person who leaves the United States for any period in excess of 90 days or for any periods that in the aggregate exceed 180 days does not qualify for adjustment of status. 8 U.S.C. § 1255(l)(3).

³⁵ 8 U.S.C. § 1255(l)(1).

³⁶ 8 U.S.C. §§ 1184(o)(2), 1255(l)(4).

Social Service Benefits

The VTVPA provides for a wide array of social services for trafficked persons and states should consider how to facilitate victim access to those services and/or how to provide a comprehensive array of similar services at the state level. For example, states could ensure that trafficking victims are eligible for victim assistance under their state crime victim compensation programs and other crime victim assistance programs, and any other social service programs for crime victims.

Under the VTVPA, trafficked persons are eligible to receive benefits to the same extent as persons who are admitted into the United States as refugees.³⁷ In order to receive this assistance, the Secretary of Health and Human Services must *certify* that the person:

- Is a “victim of a severe form of trafficking;”
- Is willing to assist in every reasonable way with the *investigation and prosecution* of severe forms of trafficking in persons; and
- Has made a bona fide application for a T-visa that has not been denied or
- Is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons.³⁸

Once individuals have been certified, they can access work authorizations, medical and psychological assistance, food stamps, housing, job training, educational programs, translation services and legal assistance.³⁹

State and local law enforcement should be required to inform the Secretary of Health and Human Services of a trafficked person’s cooperation in the investigation and prosecution of all state and local crimes that appear to involve human trafficking. Mandating this type of notification will help ensure that trafficked persons receive the federal benefits to which they are entitled under the VTVPA.

Legal Rights

States anti-trafficking laws should also include provisions ensuring that trafficked persons can access legal rights similar to those contained in the VTVPA, including the right to witness protection, mandatory restitution, civil actions, shelter, medical care, information, and legal services.

Witness Protection

The VTVPA contains a provision ensuring that trafficked persons and their family members are protected from intimidation, harm, and threats of harm.⁴⁰ As a result, their names and identifying information are

³⁷ 22 U.S.C. § 7105(b)(1)(A).

³⁸ 22 U.S.C. § 7105(b)(1)(c). *See also* Pub. Law No. 108-193, § 4(a)(3).

³⁹ *See* 28 C.F.R. § 1100.33(a).

⁴⁰ 28 C.F.R. § 1100.31.

not disclosed to the public.⁴¹ Additionally, the VTVPA provides trafficked persons with the access to the federal witness protection program.⁴²

Mandatory Restitution and Civil Actions

Restitution for trafficked persons is mandatory in the VTVPA in the following successful criminal actions: trafficking, sex trafficking of children, peonage, slavery, involuntary servitude, and forced labor.⁴³ Courts must order the defendant to pay the trafficked person the full amount of his or her losses, which includes medical and psychological assistance, attorney's fees and other losses suffered as a proximate cause of the offense, as well as the value of the person's labor calculated as the greater of (1) the gross income or value to the defendant of the trafficked person's services or labor, or (2) the value of the labor under the Fair Labor Standards Act.⁴⁴ Once a defendant has been convicted or has pled guilty to the charges, courts are required to enter restitution orders, regardless of the defendant's economic status.⁴⁵

Additionally, trafficked persons have the right to bring civil actions against their traffickers.⁴⁶ The civil action allows trafficked persons to be fully compensated for the harm they have suffered and to collect punitive damages.

State laws should include similar provisions.

Shelter, Medical Care, and Access to Information and Legal Services

While in the custody of the federal government, trafficked persons are guaranteed shelter appropriate to their status as crime victims.⁴⁷ Regulations indicate that alternatives to formal detention must be considered in every case.⁴⁸ If detained in federal custody, officials must make efforts to house trafficked persons separately from criminals.⁴⁹ Trafficked persons in federal custody are also guaranteed necessary medical care, and other assistance, including a referral to a nongovernmental organization to advise them of their legal rights.⁵⁰ State laws should contain similar provisions.

PREVENTION OF TRAFFICKING

The VTVPA created training programs for law enforcement officials. Human trafficking is a hidden phenomenon. Many people are unaware of the problem and, when they encounter a migrant working in harsh conditions, they unfortunately look the other way. However, many of those migrants are victims of human trafficking and thus law enforcement officials need to be better informed and trained. In order to ensure that they are fully educated on the new law and the trafficking phenomenon, state legislators

⁴¹ *Id.* Family members protected by the TVPA include spouses, children, parents, or siblings who have been targeted or are likely to be targeted by traffickers and for whom protection from harm may be reasonably provided. At the discretion of the responsible official, protection may be extended to other family members not included in the above definition. 28 C.F.R. § 1100.25.

⁴² Victims and Witness Protection Act (VWPA) of 1982, 28 C.F.R. § 1100.31.

⁴³ 18 U.S.C. § 1593.

⁴⁴ 18 U.S.C. § 1593(b)(3).

⁴⁵ 18 U.S.C. § 2259(b)(4). The procedure for issuing restitution is set forth in 18 U.S.C. § 3664..

⁴⁶ 18 U.S.C. § 1595.

⁴⁷ 22 U.S.C. § 7105(c)(1)(A).

⁴⁸ 28 C.F.R. § 1100.31(b).

⁴⁹ *Id.*

⁵⁰ 8 U.S.C. § 1101(i)(1).

should require training for law enforcement officials on the appropriate means of identifying trafficked persons as victims and directing them to service providers. The trainings done at the federal level could serve as models.

Legislators could also consider creating state education programs to increase public understanding of human trafficking as a crime. The VTVPA may provide a model for this type of program; it requires the federal government to consult and cooperate with nongovernmental organizations to increase awareness of human trafficking and the protections available for victims.⁵¹

State legislators may also want to consider establishing a state interagency task force modeled after the federal Interagency Task Force to Monitor and Combat Trafficking, which is mandated to collect and organize data and information on trafficking.⁵² This information is used to guide efforts to combat trafficking and to help trafficked persons within the United States.⁵³

APPROPRIATIONS

Lastly, state legislators should ensure that a new state trafficking law does not contain unfunded mandates. The law should authorize appropriations to fund training, investigations, prosecutions and victim-witness support services. It should fund service providers and advocates who provide services and shelter to trafficked persons. It should ensure that housing is available for person immediately after being removed from the trafficking situation, as well as in the long term. Even if the trafficked person qualifies for federal benefits, a delay of days or even weeks is common between the time of identification of a trafficked person and authorization of federal refugee benefits.

On the federal level, the VTVPA authorizes Congress to appropriate funds for anti-trafficking activities coordinated by the Attorney General and the Secretary of Health and Human Services, among others.⁵⁴ The Department of Justice, through the Office for Victims of Crime and the Department of Health and Human Services, through the Office of Refugee Resettlement, funds U.S. organizations to provide comprehensive services to trafficked persons. These services include legal assistance, shelter, medical and mental health services, and crisis counseling.

⁵¹ 22 U.S.C. §§ 7104(b), 7104(f).

⁵² 22 U.S.C. § 7103. The federal Interagency Task Force to Monitor and Combat Trafficking consists of the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the CIA Director, and other officials designated by the President *Id.*

⁵³ *Id.* Federal agencies must also provide research grants to nongovernmental organizations, relevant government agencies, and international organizations to examine the economic causes and consequences of trafficking and the effectiveness of anti-trafficking and victim assistance programs, among other issues. 22 U.S.C. § 7109a.

⁵⁴ The VTVPA also authorizes appropriations for the Secretary of State and the Secretary of Labor as well as for foreign victim assistance, aid to foreign governments, and for the Interagency Task Force to Monitor and Combat Trafficking. See Pub. Law No. 106-386, § 113; Pub. Law No. 108-193, § 7.

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