



COALITION TO
ABOLISH SLAVERY
& TRAFFICKING

October 9, 2017

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Dear Ms. Stevens:

The Coalition to Abolish Slavery and Trafficking (CAST) submits these comments in response to the Notice of Proposed Rulemaking by the Department of Industrial Relations, Division of Labor Standards Enforcement under Labor Code sections 59, 95, and Business & Professions Code section 9998.11, proposing to adopt sections 13850 through 13874 in proposed Subchapter 13 of existing Chapter 6, of Division 1, of Title 8, California Code of Regulations, relating to Foreign Labor Contractor Registrations.

The Bill's sponsors intended the legislation to cover all non-immigrant visa categories with only two narrow exceptions.

CAST is the largest comprehensive service provider for trafficking victims in the United States. CAST currently represents clients coming from 33 countries around the world, many on temporary work visas. As we testified at one of the committee hearings when SB 516, the predecessor of SB 477, was making its way through the legislative process: "While one often thinks that *undocumented* immigrants are those most susceptible to human trafficking, our caseload is showing that labor trafficking is flourishing in the context of documented visa programs. In fact, of our current legal caseload of 126 clients, almost 50% of these individuals came to the United States on lawful visas."

Since 2007, CAST has recognized that unscrupulous foreign labor contractors (FLCs) were exploiting non-immigrant workers both in their soliciting and recruiting activities, as well as once the workers entered employment in the United States. To address this issue, CAST in 2013 sponsored SB 516 with Senator Steinberg as the Bill's author, which called for: 1) registration by FLCs; 2) use of registered FLCs by employers using the services of these parties in their hiring processes; 3) comprehensive disclosure to prospective workers of their rights; 4) imposition of penalties for violations of the statute; and 5) a complaint mechanism for aggrieved workers to recover damages.

CAST was proud to sponsor both SB 516 and its successor SB 477, which takes a multipronged approach to ending abuses of non-immigrant workers coming to California on lawful temporary visas. When CAST drafted and testified on these bills, it was with the understanding that the legislation would provide a strong framework for protecting the estimated 130,000 temporary workers coming to California annually in 2013 and working in a broad spectrum of occupations under all visa categories.

In fact, it was not until the bill was passing through the committee process that any discussion of exceptions to the bill's scope was first addressed. At the end of the legislative process, when SB 516 was signed into law, there were only two narrow exceptions to the visa categories included in the statute. CAST was directly involved in negotiations for these exceptions. The first was for talent agencies, as they are already regulated in a more comprehensive manner than the provisions that now SB 477 mandate. The second was for FLC's recruiting individuals under J-1 visas. While CAST and Senator Steinberg firmly believe that the J-1 visa should be included, we reluctantly agreed to the exception to move the bill out of committee after careful negotiations.

To remove final opposition to the bill, we were required to make one other substantial revision. As a result of negotiations with the Chamber of Commerce, we agreed to remove one of the most significant enforcement provisions. Section 8 of SB 516 originally provided joint and several strict liability for employers who used FLCs in California. We replaced this section with a "safe harbor" provision for employers using a registered FLC.

It is CAST's belief having been part of the extensive legislative process and negotiations surrounding SB 516 and SB 477 that at no time was it CAST's, the bill's author, or the many individuals who testified both in support of, and opposition to, the bill's, understanding that SB 516, and ultimately SB 477, would not cover all temporary visa categories, with the two limited exceptions noted above. There was absolutely no discussion that the law would be limited solely to the H-2B visa class. Had that been the case, there would have been no need to compromise with the J-1 lobby or have any conversations with the talent agency lobbyists and other business groups who argued for their exclusion from coverage under the law.

Governor Brown in 2013 vetoed SB 516 on the grounds that the \$500 registration fee included in the statute was insufficient to cover the costs of the program. CAST provided his office with a memorandum showing that the costs could be covered assuming the number of workers continued to be in the range of 130,000 workers per year. SB 477 was introduced the following year and only one change was made—the amount of the fees would be left to the Labor Department's discretion as long as it was set at a number sufficient to cover the program's costs of registration and enforcement based on the 130,000 estimate number. The legislature passed the bill and the Governor then signed this groundbreaking legislation into law.

The regulations as currently drafted substantively revise the law by impermissibly limiting its scope to the H-2B visa category and fail to include meaningful enforcement provisions.

Codified at Business & Professions Code section 9998 et seq., California’s SB 477 (2014) is the first legislation of its kind in the United States and therefore is of import not just in protecting the rights of workers and preventing human trafficking in California, but also as a model for other states across the country, federally, and even around the globe. SB 477 bans international labor recruiters from charging workers recruitment fees, requires that recruiters register, bonds recruiters, and requires that workers be given detailed contracts, among other provisions. SB 477 is currently the strongest law on the books in the United States related to regulating the international labor recruitment industry. It empowers migrant workers to exercise their labor rights and access justice, while bringing transparency to the recruitment and subcontracting process. This effort falls in line with a growing consensus at the national and global levels that reforming the international recruitment and placement process is an achievable and essential step to protecting migrants’ rights.¹

While the proposed regulations implementing SB 477 contain some strong provisions in line with the intent of the bill, the regulations contain two fundamental errors, as well as other provisions that could be strengthened. First, the proposed regulations improperly define “foreign guest worker” by narrowing the scope of the law to apply to H-2B recruiters only, despite the unambiguous language of SB 477 as enacted and the intent of the California Legislature that the law should cover recruitment for all visas except J-1 and for all sectors except talent agency recruitment. Second, the regulations fail to provide for effective enforcement of the law. If not corrected before the regulations are finalized, these two errors would largely subvert the law’s clear purpose of regulating foreign labor recruiters across visa categories and preventing labor exploitation and human trafficking by foreign labor recruiters. We urge you to correct these two fundamental errors and to make other adjustments to the regulations, as detailed below, in order to give full meaning to this groundbreaking legislation that stands to protect migrant workers from exploitation and trafficking across visa categories and industry sectors.

I. Article I. Scope, Coverage, and Definitions

A. Definitions

1. Recruitment and Solicitation

The proposed regulations include strong definitions for the terms recruiting and recruits, soliciting and solicits, transportation, and processing. These key definitions rightly include a broad chain of recruiters between the employer and the worker. In order to give meaning to the law’s ban on charging workers fees, all actors in the chain of recruitment must be identified, including those intermediaries who might

¹ For example, Subtitle F of the U.S. Senate’s 2013 comprehensive immigration reform bill addressed recruitment abuse. The Obama administration’s Executive Order 13627, likewise, seeks to end trafficking and exploitative recruitment practices in federal contracts. Globally, the 2014 protocol to the ILO’s forced labor Convention (C 29) included modern forms of forced labor and made explicit reference to the acute vulnerabilities of migrant workers. The ILO and the IOM are both currently exploring initiatives to empower workers in the recruitment process.

otherwise evade the law's requirements. Creating transparency at all stages of recruitment ensures that employers cannot turn a blind eye to abuses that happen further down the chain of recruitment than their initial points of contact. We strongly commend the inclusion of transporters and processors, who often charge workers fees and perpetuate fraud in recruitment.

Sec. 13850(a) and (b) correctly include "purporting" to hire prospective workers in the definitions of recruit and solicit -- an important inclusion that supports the goal of rooting out fraud committed by recruiters. Recruitment fraud, by which a recruiter charges a worker a recruitment fee, sometimes as high as \$5,000, \$10,000, or even \$20,000, for a job that does not exist or is not connected to that recruiter, is extremely common in foreign labor recruitment.² By including recruiters who purport to hire workers for nonexistent jobs, the definitions of recruit and solicit in Sec.13850(a) and (b) capture fraudulent activity by recruiters within the scope of the law. We strongly commend their inclusion within the proposed regulations.

We recommend the following changes to bring the definitions in line with existing law and to ensure broader coverage of recruitment activities within the definitions of "recruiting" and "recruits," as well as "soliciting" and "solicits."

a. Include Recruiter Training as a Recruitment Activity.

One type of recruitment activity that is not captured in the proposed regulations is training conducted by recruiters and their agents in countries of origin. Often, recruiters either provide or employ trainers to provide workers with orientation around working in the United States, but rather than training workers on their workplace rights or the recruitment process, these trainers coach workers to be compliant -- to ignore abuses and exploitation. For example, the Philippine government mandates that all prospective Filipino migrants attend a Pre-Departure Orientation Seminar (PDOS). These are provided directly by the Philippine Overseas Employment Administration (POEA) or private agents approved by the POEA. Research of PDOS seminars reveals that prospective migrant workers are actively discouraged from raising labor and employment-related issues to their employers and/or the proper authorities.³ We

² A recent report found that of over 220 H-2 workers interviewed, 10% reported experiencing recruitment fraud. See Centro de los Derechos del Migrante, Inc., entitled *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Visa Programs and Recommendations for Change*, (2013).

³ See Rodriguez, Robyn Magalit, *Migrants for Export: How the Philippine State Brokers Labor to the World* (University of Minnesota Press, Minneapolis, 2010), documenting training abuses in the recruitment process of Filipino workers, who constitute a large proportion of workers covered by SB 477; see also Guevarra, Anna Romina. Guevarra, Anna Romina, *Marketing dreams, manufacturing heroes: The transnational labor brokering of Filipino workers* (Rutgers University Press, 2009).

therefore recommend including “trains” within the recruitment activities included in the definitions of “recruiting” and “recruits,” and “soliciting” and “solicits.”

b. Include Recruiter Influence as a Recruitment Activity.

Within the recruitment activities, we also recommend including “influences” in order to bring the definitions in line with the protections already afforded by California Labor Code Sec. 970, which states:

No person, or agent or officer thereof, directly or indirectly, shall *influence*, persuade, or engage any person to change [...] from any place outside to any place within the State [...] for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form [...] (emphasis added)

Since “influences” is broader than “entices” or “secures,” this addition to the current definition is necessary to avoid narrowing existing law.

c. Ensure that Direct and Indirect Engagement is Covered.

Labor Code Sec. 970 extends to individuals who both “directly or indirectly” engage in the defined activity. In order to avoid improperly narrowing the definitions of recruitment activity, both direct and indirect activity should be covered in the definitions of “recruiting” and “recruits” and “soliciting” and “solicits.”

d. Ensure that Both Services and Labor are Covered.

Finally, we recommend that the final phrase of the definitions of “recruiting” and “recruits” and “soliciting” and “solicits” be amended to more clearly define the types of work covered. We are concerned that “to perform labor *related* to a potential temporary or permanent employment opportunity” leaves open to interpretation the types of work upon which recruitment activities are contingent. Instead, we recommend defining the work related to recruitment as “services or labor performed” in California.

Suggested Language (additions in italics, deletions in strikethrough):

Sec. 13850(a). “Recruiting” and “recruits” means any *direct or indirect* activity performed by a person which entices, secures, *influences*, persuades, hires, *trains*, purports to hire, transports, or otherwise seeks to process or secure employment of a worker, or group of workers, *for services or labor to perform labor which is related to a potential temporary or permanent employment opportunity* in California.

Sec. 13850(b). “Soliciting” and “solicits” means *directly or indirectly* conducting or performing any communication, including but not limited to advertisements, distribution of information using any media or other person or entity which informs, offers, or purports to offer to a prospective worker, or group of workers, information regarding terms of *employment for services or labor work for the worker to consider or accept which is related to a temporary or permanent employment opportunity* in California.

2. Foreign Guest Worker

At Sec. 13850(c) of the proposed regulations, the Department of Labor Standards Enforcement (DLSE) incorrectly interprets the clear language of SB 477 with respect to the definition of “foreign guest worker.” In direct contravention of the law, DLSE’s interpretation would narrow the scope of SB 477 to H-2B workers rather than covering all workers on work visas except those explicitly carved out in the clear language of the law. Rather than covering an estimated 130,000 workers,⁴ DLSE’s interpretation would limit the law’s coverage to 2,130, just 1.6% of the workers the law was intended to cover.⁵ This interpretation directly contravenes the explicit language of SB 477 and the unambiguous intent evidenced by the legislative history of the Act. This interpretation would severely undermine the effectiveness of this groundbreaking legislation.

The definition in the proposed regulations states:

“Foreign guest worker” means a foreign worker, as defined in Section 9998.1, who is recruited and/or solicited by a foreign labor contractor to perform temporary

⁴ California’s estimated 130,000 workers represent 15% of the total 840,000 such workers in the United States. See “Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2011,” Population Estimates-September 2012, Office of Immigration Statistics, Dep’t of Homeland Security. http://www.dhs.gov/sites/default/files/publications/immigration-statistics/ois_ni_pe_2012.pdf. This report was issued in November 2013, and reflects data compiled for the 12-month period centering on January 2012.

⁵ See Dept. of Labor, Office of Foreign Labor Certification, Disclosure Data, H-2B FY2016, *available at* <https://www.foreignlaborcert.doleta.gov/performance/cfm>.

nonagricultural labor in California *pursuant to Section 1101(a)(15)(H)(ii)(b)* of the Federal Immigration and Nationality Act, commonly known as the “H2b” worker visa program. (Emphasis added.)

However, the enacted statutory language is clear in that it defines “foreign worker” as:

“Foreign worker” means any person seeking employment who is not a United States citizen or permanent resident but who is authorized by the federal government to work in the United States, *including a person who engages in temporary nonagricultural labor pursuant to Section 101(a)(15)(H)(ii)(b)* of the federal Immigration and Nationality Act.⁶ (Emphasis added.)

The proposed regulations incorrectly redefine the statutory language as applying *only* to H-2B workers. However, the statutory language unambiguously singles out H-2B workers as just one of the classes of visas holders who are included. Had the legislature intended the language in Section 9998.1(c) to limit the chapter’s coverage to H-2B visa recipients only, it would not have included language expressly including H-2B workers.

DLSE’s proposed definition of “foreign guest worker” expressly contravenes the clear statutory language of SB 477 and the intent of the legislature⁷ to cover all visa categories except J-1 and all industries except talent agencies, which are the only categories explicitly excluded under the law:

“Foreign labor contractor” **does not** include a person licensed by the Labor Commissioner as a talent agency under Chapter 4 (commencing with Section 1700) of

⁶ Cal.Bus.&P.C. §9998(c). The definition of foreign worker is important in SB 477 because it is a component of the definition of “foreign labor contracting activity,” as mentioned above.

⁷ Lawmakers involved in the drafting process would agree that the intent was to cover all foreign labor recruiters, not just H-2B recruiters. Even the Governor of California considered that SB 477 would cover more than H-2B workers. SB 516, SB 477’s predecessor, was not signed into law by the Governor because of concerns that there wouldn’t been sufficient fees generated by the registration process to cover expenses of implementing the law.

Therefore, before approving SB 477, the Governor considered the scope of the potential foreign labor contractors who would need to pay registration fees, and included within that consideration, recruiters seeking workers under several nonimmigrant visa programs, including H-1B and H-2A, as well as H-2B. In fact, in a memorandum prepared for the Governor, which he found to be persuasive, the number of foreign labor contractors was based on estimates reflecting the number of workers admitted: H-1B had 153,759 positions in California; H-2A had 3,147 position requests; and H-2B had 2,188. Had the Governor thought that SB 477 only regulated H-2B recruiters, he might not have signed it into law.

Part 6 of Division 2 of the Labor Code, or a person who obtained and maintains full written designation from the United States Department of State under Part 62 of Title 22 of the Code of Federal Regulations.⁸ (Emphasis added.)

If the legislature had intended SB 477 to be limited only to nonagricultural workers in the H-2B nonimmigrant visa program, there would have been no need to carve out these explicit exclusions for talent agencies and J-1 sponsors within the universe of foreign labor contractors to be regulated – because they already would have been excluded by virtue of the chapter’s limitation to H-2B workers.

Accordingly the only credible reading of the statute’s exclusionary language is limited to talent agencies and J-1 sponsors.

As an apparent justification for this unauthorized, unsubstantiated, and erroneous narrowing of the law, the notice of proposed rulemaking states that the rules “will further accomplish the objective of the legislation (SB 477) to enhance the protection of foreign workers under the federal H2b worker visa program.”⁹ This purported “objective” has no basis in the text of the statute, or in the demonstrated legislative intent behind the law. Nowhere in the legislation itself or the legislative history is such a limited objective stated or even implied. Had that been the legislature’s intent, the law would have been explicitly written to cover only the H-2B visa category. Instead, the clear language of the law provides that H-2B workers are included within the group of people covered by the definition of “foreign guest worker” under the law. The unjustified limitation in the proposed regulations to only H-2B workers subverts the law’s clear language and intent.

To remedy the drafting error at Sec.13850(c), we strongly recommend deleting “to perform temporary nonagricultural labor in California pursuant to Section 1101(a)(15)(H)(ii)(b) of the Federal Immigration and Nationality Act, commonly known as the ‘H2b’ worker visa program.”

B. Coverage

Sec. 13851 defines who is subject to the provisions of the law as a foreign labor contractor, explicitly excluding (1) the employer, and (2) an employee of the employer who recruits directly, without intermediaries, for the employer’s own use. The proposed regulations rightly include all non-employee agents of employers and staffing agencies as recruiters, subject to the law. This language in the proposed regulations helps to ensure that staffing agencies are not be able to evade compliance under the

⁸ Cal.Bus.& P.C. §9998.1(d).

⁹ Notice of Proposed Rulemaking, Subject Matter of Regulations: Foreign Labor Contractor Registrations TITLE 8, California Code of Regulations, Sections 13850 et seq., State of California Dept. of Industrial Relations, Division of Labor Standards Enforcement, at 7-8.

exception for direct recruiting by employers. The proposed regulations also properly prevent an employer from avoiding application of the law by using a third party whom it contends is an agent not subject to the registration requirements, by denominating such actors as “non-employee agents” who are subject to all the obligations imposed on a foreign labor contractor. These provisions should be maintained in the final regulations.

We recommend that the regulations at Sec. 13851(e)(2) specify an employer’s *liability* for failure to disclose use of a non-employee agent in addition to other obligations. Section 13851(e)(2) of the proposed regulations should be updated to explicitly reference the liability provisions.

Suggested Language: Sec. 13851(e)(2). Any employer using the agent is subject to the disclosure requirement in B&P Code 9998.2(b), and all other obligations of an employer under the Act and this subchapter, *including the liability provisions.*

II. Article 2. Registration

Article 2 of the proposed regulations delineates the registration process; the process for determining character, competency, and responsibility; certification procedures; and bonding.

1. Application

In order to strengthen the review of potential registrants, we recommend the following additions and changes to the recruiter application form:

- a.** At Sec. 13853(a)(2), include the length of time applicant has been conducting recruitment activities and a list of all business names used during that period, rather than just names for the past three years.
- b.** At Sec. 13853(a)(4), specify the penalty for failure to update contact information, such as the penalties set forth in Sec. 13630 et seq., applicable to garment manufacturers, which are \$100 per affected employee for the first violation and \$200 for the second or subsequent violations.
- c.** List all domestic and international locations where applicant is doing business.
- d.** Include information about key employees and related entities.
- e.** At Sec. 13853(a)(7), include more detailed information about employers with whom they have previously worked, such as number of workers recruited, occupations of recruited workers, salary ranges, visa categories, and overall value of contract(s) with employer(s).
- f.** Include the means of notifying the DLSE when relationships with employers end and new relationships begin.

- g. At Sec. 13853(a)(9), require reporting of past bad conduct in the past 10 years rather than only 5, and including at least the same bad acts rather than fewer, in order to mirror current requirements for farm labor contractors in California.¹⁰ There is no reason that foreign labor recruiters should not be held to the same standard as farm labor contractors and the new regulations should at a minimum mirror the standards already in existence for farm labor contractors.
- h. Typographical error: in Sec. 13853(a)(9)(B): Change “(v)” to “(iii).”
- i. At Sec. 13853(a)(10), include information on training of employee recruiters on responsibilities and mandate of SB 477.
- j. At Sec. 13853(a)(11), include information on recruiting and soliciting activities, including how they are conducted and how much money is devoted to them.
- k. At Sec. 13853(a)(13)(E)(iii), include all relevant provisions of Penal Code Sec. 236.1 relating to human trafficking, rather than just false imprisonment.
- l. At Sec. 13853(a)(13)(H), include “omissions” in addition to “misrepresentations” as grounds for denial or revocation of registration.
- m. At Sec. 13853(b)(2), include any government identification numbers for foreign entities.
- n. Include professional associations to which the applicant belongs.
- o. Include other labor contracting licensing and/or registration systems to which applicant is also subject.
- p. Include a provision for “other information the DLSE determines is relevant.” As this is a first-of-its-kind law, the DLSE may find it needs to collect additional information, based on what it learns in the first years of implementation.

Finally, we recommend that the form be published for public comment before the regulations take effect.

2. Character, Competency, and Responsibility

Although the registration process requires recruiters to submit a detailed application, the proposed regulations do not contain a requirement that the information included in the application be made public on the DLSE website. Information from the registration application, including information related to character, competency, and responsibility under Sec. 13855, as well as employer and worker disclosures required under Sec. 13865 and 13874, should be publicly available on DLSE’s website in order to enable workers, employers, and the general public to evaluate the legitimacy of recruiters. Publishing this information follows the intent of the legislation to increase transparency in the process to protect workers from labor exploitation and human trafficking.

Suggested language: “All of the information provided in an application will be available to the public on the DLSE’s website.”

¹⁰ See Sec. 13660(a)(16).

3. Registration Certificate

The proposed regulations require that the names of registrants, their employees, and other registered foreign labor contractors be published online. This information is an important starting point, but the regulations do not go far enough in ensuring transparency in recruitment.

Across visa categories and industry sectors, recruiters often charge workers high fees to come to the United States. Workers take out loans or liens on property in order to access these jobs. Recruiters regularly commit fraud in the recruitment process, either by charging workers recruitment fees for jobs that do not exist or by misrepresenting the terms of employment. Besides the recruiters who have initial contact with workers in their communities of origin, other recruitment intermediaries assess additional fees above and beyond the costs of travel and admission.¹¹ Unless and until the entire recruitment process is transparent, the regulations will not give full meaning to the law's intent. The ban on charging workers fees -- fees that serve as a gateway to labor abuses, economic coercion, and human trafficking -- cannot be enforced unless every actor in the chain of recruitment is identified. Recruitment fraud cannot be eliminated unless a worker can verify the terms of employment and verify that a recruiter in the community of origin is in fact recruiting on behalf of an employer. Real-time publication of recruiter registration and language accessibility to workers are critical elements of the online registry's utility to workers.

Additionally, the proposed regulations fail to create a mechanism for showing relationships between employers and the chain of recruitment. The relationships between employers and all recruiters should be visually and technologically linked.

Sec. 13853(a)(6) requires that recruiters name other registered recruiters and other non-registered recruiters, including their employees, with whom they are working. In addition to gathering these names, we recommend that the registry include the names of unregistered foreign labor contractors who have been reported to DLSE -- regardless of whether they have applied for registration -- in order to incentivize registration.

Moreover, we strongly recommend the following additions to the proposed regulations in order to improve the functionality of the recruiter registry:

- Relationships between all actors in the chain of recruitment, both foreign and domestic, must be clearly displayed.

¹¹ See *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* (2013), available at <https://fairlaborrecruitment.wordpress.com/report/>.

- All employers for whom the recruiter recruits must be named.
- The job contract must be linked to the registry so that workers can verify terms of employment.
- The registry must be published in real-time.

If the registration application is not published as recommended above, we recommend that the information published in the online registry pursuant to Sec. 13856(g) be broadened to include, at a minimum: the length of time a recruiter has been registered or engaged in recruiting activities prior to the Act; names and identifying information of all the employer clients of the recruiter, including occupations of workers, number of workers recruited, wages to be paid, workplace location, and dates of employment for workers; and other licenses and registrations held by the recruiter, a copy of the contracts with the workers, and the length of time the recruiter has been in business.

So that the registry is useful to workers in evaluating job opportunities and verifying the existence of jobs, we recommend that the registry include information in multiple languages, covering those most frequently encountered by workers.

We recommend that the registry enable workers to provide reviews, comments, and feedback on their experiences with specific recruiters.

At Sec. 13856(b), we recommend that DLSE require foreign labor contractors to register annually rather than biannually, noting that registrations for garment manufacturers at Sec. 13635, which DLSE consulted in drafting these regulations, have a one-year duration.¹²

Under Sec. 13856(e), we recommend that changes to contact information be required within a maximum of 5, rather than 10, days as under the farm labor contractor requirements.¹³

4. Bond

With respect to the retention of a bond after a foreign labor contractor goes out of business at Sec.13857(d), the regulations should extend the period from the proposed six months to the period of the relevant Statute of Limitations for human trafficking, which is seven years in California for civil damages and allows both treble and punitive damages. If this time frame is deemed too lengthy, at a minimum, it

¹² See Sec. 13636.

¹³ See Sec.13660(a)(3).

should be extended to two to three years, as these are the common statutes of limitations for claims such as fraud, breach of contract, or lost wages in California.

Further, we recommend adding a rebuttable presumption that an employer should have known he was contracting with an unregistered recruiter, placing the burden of proof on the employer to prove he thought he was using a registered recruiter.

Suggested Language: “Use of an unregistered recruiter is prima facie evidence of an employer’s knowledge of the recruiter’s illegal status for purposes of the obligations and liability provisions of the law. The burden of proof rests with the employer to affirmatively prove that he reasonably believed the recruiter to be registered.”

III. Article 3. Denial of Registration; Suspension and Revocation

Article 3 creates a process for denial or registration, suspension, and revocation of registration, and defines a hearing process. We recommend providing clarification as to the hearing process. It is unclear from the proposed regulations who may file an “accusation” or a “statement of issues” for purposes of instituting revocation or renewal proceedings under Sec. 13859(a)(1)-(2).

Suggested Language: Add new subparagraph at Sec. 13859(a)(3) as follows:

“Any person may initiate proceedings to deny, revoke, suspend or condition a foreign labor contractor’s registration.”

Finally, in Sec. 13868, the proposed regulations contain a typographical error: “not” should be inserted before “registered” in the second sentence of the paragraph.

IV. Article 4. Disclosure to Labor Commissioner of Use of Foreign Labor Contractor

The proposed regulations at Article 4 clearly define the mens rea requirement for employers who know or should have known they were not using registered recruiters, and we support maintaining this definition. This article could be improved by specifying at Sec. 13865(c) that an employer must make disclosures to the Labor Commissioner within 24 hours of contracting with a recruiter. Finally, we recommend that the

proposed regulations at Sec. 13865(c)(2)(C) require the employer to include among the disclosures a copy of the contract provided to the worker.

Suggested Language: The employer must make the disclosures required under this section within seven days after contracting with a foreign labor contractor. A copy of the contract between the employer and the prospective worker must be part of this disclosure.

V. Article 5. Prohibited Fees & Costs; Post-Hire Costs and Expenses; Disclosures to Worker by Contractor

Sec. 13870 contains a robust definition of recruitment fees, which is essential to eliminating economic coercion that can result in human trafficking and that leaves workers vulnerable to abuses in the workplace. To prevent these abuses, the intent of the legislation is that workers should not begin work indebted. Workers who arrive indebted face additional barriers to reporting abuses, such as fear of retaliation, firing, and non-recruitment for subsequent jobs.

We recommend maintaining the itemized definition and including the following additional fees, which also serve to economically coerce workers: recruiting, soliciting, identifying, placing potential job applicants, potential employees, persons who may be referred or contracted for employment, and employees; labor broker services, both one-time and recurring; covering the cost, in whole or in part, of advertising; the inclusion of a collateral requirement, such as land deeds, in contracts; contract breach fees; and insurance.

Sec. 13872(a) enumerates several categories of costs which recruiters and their agents cannot charge workers. In addition to the listed costs, we recommend including fees for future employment opportunities, which are fees that foreign labor contractors commonly charge internationally recruited workers to “lock in” jobs in future seasons. We also recommend modifying section 13872(b)’s statement that workers shall not be charged for “costs or expenses which are not customarily assessed against workers similarly employed in the United States.” Employees in many industries in the U.S. are “customarily” (i.e., very often) charged for expenses—for example, required tools, safety equipment or uniforms—that current law requires their employers to bear. To clarify that employers can only charge workers for costs or expenses permitted by law, we suggest replacing the quoted language with “costs or expenses such as tools, safety equipment or uniforms that are required for the job.”

We also note that the allowable post-hire costs listed in Sec. 13873 contain at least one misstatement of current law. Employers are generally not permitted under California law to charge their employees “market rate” for lodging, as suggested under subsection (a)(1). To the contrary, the DLSE’s own

minimum wage notice specifies permissible lodging credits well below market rates, and in the case of full apartments, no more than two-thirds of the “ordinary rental value” of the unit.¹⁴

In terms of the worker disclosures required under Sec. 13874, timing is critical to a worker’s ability to evaluate a job opportunity and provide informed consent. A worker should not have to wait until a consular appointment to receive a copy of her contract. If the registry created by this law provides true transparency in recruitment in real-time, a worker should be able to verify the existence of a job, the terms of employment, and the recruiter’s relationship to the employer. In Sec. 13874(a), we recommend striking “but in no event later than the time for applying for a work visa,” since disclosure to workers should be provided at time of recruitment.

Under Sec. 13874(b)(6), we recommend adding a sub-paragraph to the contents of the employment contract to include: meals, rest periods, wage stubs with explicit information, meal provisions, production standards, sanitary and housing conditions, and notice of the existence of strikes, lockouts, or labor disputes.

The enforcement instructions at Sec. 13874(b)(10) are deficient as an enforcement mechanism. In fact, an enforcement mechanism for the law as a whole is almost completely absent in the proposed regulations. Effective enforcement of the law will require: (1) meaningful notice; (2) a complaint resolution mechanism that is accessible to workers; (3) rigorous audits and investigations, both routinely and as required; and, (4) prompt investigation and resolution of complaints. These areas must be detailed in the final regulations.

1. Notice

A workforce that is informed of its rights is necessary to the enforcement of this law. Internationally recruited workers, who often arrive with only basic knowledge of the United States, face numerous barriers to accessing justice. Since their visas are tied to their employers, workers fear retaliation if they complain about abuses. Many workers do not know that they have even basic rights in the United States. Sec. 13874(b) requires that recruiters disclose basic rights information, but the information currently required under the proposed regulations is not complete, nor is it presented in a manner that is easily understood by workers.

All internationally recruited workers must receive written notice of the resources available through DLSE for bringing complaints at the time of recruitment. The limited information provided at Sec. 13874(10)

¹⁴ See DLSE Official Notice, Minimum Wage, available at <http://www.dir.ca.gov/iwc/mw-2017.pdf>.

should be expanded to include the information in DIR's existing workers' rights flyer.¹⁵ Also, Sec. 13874(b)(10) should be expanded to clearly define the worker's rights under SB 477, as well as other federal and state laws, in the worker's native language. We recommend that DLSE work closely with the migrant workers' rights community to develop materials that effectively convey workers' rights under this and other applicable laws. We further recommend that DLSE, in collaboration with California-based organizations that work with communities of origin, require that recruiters in countries of origin partner with local community-based groups in providing training to ensure that unscrupulous recruiters do not use the training process to coach workers against asserting their rights and accessing justice.

Suggested Language: DLSE will establish and publish on its website procedures for workers to file complaints for violations of this section.

To account for the fact that recruiters may not always provide workers with this information, we recommend including additional methods through which workers receive notice of their rights under this law. DLSE should work with the embassy and consular staff in workers' countries of origin to ensure that workers are apprised of SB 477's provisions. Additionally, the Labor Commissioner should collaborate with the Employment Development Department's Labor Certification staff to ensure notice to workers. As part of the implementation process, the Commission should partner with Customs and Border Patrol to ensure that any worker entering the United States through a port of entry in California receives a disclosure of rights.

Also, DLSE should create a mandatory orientation process, immediately upon workers' arrival to California, through which internationally recruited workers in all visa categories are invited to learn about their rights and protections under SB 477 as well as state and federal law. During this mandatory orientation, the representative of the Labor Commissioner should confirm that workers have received the required worker disclosures during the recruitment process. As mentioned above, the DLSE should be required to partner with community-based organizations to ensure that workers' learn about their rights and can be connected with broader social networks. Workers' social isolation from modes of public transportation, family, ethnic enclaves, faith-based communities, etc., is often exploited by recruiters. The regulations should require that DLSE develop, update, and disseminate materials and provide training apprising recruiters and employers of their responsibilities under SB 477. DLSE should partner with community-based organizations in countries of origin in order to ensure quality control of trainings conducted by recruiters. The proposed fees for the registration process should be commensurate with funding required to cover these costs

2. Complaint Resolution Mechanism

¹⁵ See <http://www.dir.ca.gov/dlse/Publications/WorkersRightsFlyer-General-English.pdf>.

Sec. 13874(b)(10) includes a hotline among the recruiter disclosures to workers, without specifying which hotline number will be used, as well as a Spanish-language hotline. Beyond providing hotline numbers, the proposed regulations fail to define a complaint intake process. For the law to meet its objective and provide a meaningful mechanism for workers to report abuses, DLSE must create a clear procedure for bringing complaints that is both supported by adequate resources and readily available to aggrieved workers. The fees proposed for the registration process should take into account covering this necessary cost.

The complaint mechanism must take into account the workers' legitimate fear of retaliation based on filing a complaint, as well as the likelihood that workers will be calling to complain about retaliation that has already occurred. The existing procedure for filing a complaint of "retaliation" in California requires that a worker mail a letter to one of two offices of DLSE.¹⁶ To make matters more confusing, filing a "wage claim" requires that a worker fill out a form either online or in-person at local office of the California Labor Commissioner. These varied process create significant barriers to workers' access to either complaint process. Guest workers already face language barriers, little to no access to computers or postal service, and often isolation in homes and labor camps. The varied complaint mechanisms unreasonably assume that the worker understands which complaint process is applicable.

We recommend that the Commissioner provide its California-based, toll-free hotline, 1-844-LABOR-DIR, to workers -- a single hotline for all types of complaints. We also recommend that the operators who manage this hotline be trained on the requirements of SB 477 and that operators provide the correct internal referrals under the new regulations to handle complaints. They should also be trained in providing correct external referrals to community based organizations with whom DLSE collaborates in the implementation of this law. The hotline must be easily reached any time of day from any part of California, and calls must be answered by a live person who has access to interpreters as needed. Because workers who fear retaliation may not file complaints while they are in the United States, this number should be able to receive international calls at no cost to the caller. Operators should apprise workers of their right to confidentiality and the immigration-related consequences of statements they make during the investigation process, if any.

DLSE should post the hotline number on its website, specifying the purpose of the hotline, including complaints under this law, as well as the procedure by which complaints will be taken, assessed, investigated, possible outcomes, and procedures for requesting and using the services of translators to assist an aggrieved worker in filing a complaint.

¹⁶ See <http://www.dir.ca.gov/dlse/HowToFileRetaliationComplaint.htm>.

The proposed regulations include the phone number for the National Human Trafficking Resource Center among recruiter disclosures to workers. At the risk of creating confusion, we recommend maintaining this number and conducting outreach to the National Human Trafficking Resource Center to ensure its staff is familiar with the new framework for protection in California and has the correct referral information to provide for the California Labor Commissioner.

For intake of complaints, we recommend that DLSE create a form based on its existing “Bureau of Field Enforcement (BOFE) Report of Labor Law Violation” that specifically addresses SB 477 and that the final regulations include a date when this form will be completed and available online. The form should be published for public comment before the regulations take effect.

In addition to the general information requested on the existing BOFE form, the new SB 477 form should include: a space for the reporting party to indicate contact information in his or her country of origin; a check-box section for an aggrieved worker to indicate which sections of SB 477 the recruiter or the employer is alleged to have violated; and the remedies sought.¹⁷ Examples of the categories that should be included in the check-box section are: recruitment fee charged; above market-rate charged for housing, transportation, food, or other services; registration violations, including employer use of unlicensed recruiter; violations of recruiter’s or employer’s disclosure requirements, including not providing documents in the worker’s native language and making false, misleading or fraudulent statements, among others; contract violations, including altering the terms of the contract without proper notice and contractual changes agreed to under duress; threats, intimidation, coercion, discrimination or retaliation against the worker or his family; visa/travel document abuses; and other violations.

The form must contain a statement explaining that specifying a type of violation by checking one of these boxes will serve only as an initial orientation to DLSE’s investigators, and will not limit DLSE’s duty to investigate to only the type of violation identified by that box. The form must also appraise workers of their right to confidentiality and the immigration-related consequences of statements they make during the investigation process, if any.

3. Audits and Investigations

The proposed regulations do not include provisions for audits and investigations. We recommend that the regulations direct DLSE to conduct rigorous audits and investigations of recruiters, both routinely and as required, to ensure compliance with the law. Investigations should include site visits and in-person interviews with workers. The proposed fees for the registration process should take into account the additional resources necessary to conduct Audits and Investigations.

¹⁷ See http://www.dir.ca.gov/dlse/DLSE1_BOFE.pdf. See attached model form, Addendum.

4. Resolution of Complaints.

The regulations should specify that when violations are discovered, the Labor Commissioner will apply the full range of penalties and remedies available under the law, including revoking recruiter registrations, collecting fines, issuing injunctions, and ordering back pay and/or reinstatement to harmed workers.

Furthermore, given that complaints arising under the law involve internationally recruited workers who are in the United States on visas of limited duration, tied to employers with undue power over workers, we recommend that the Labor Commissioner indicate in the regulations that it will act within a maximum of 7 days to address all grievances arising under these regulations.

We recommend that the regulations specify zero tolerance for lawbreakers,¹⁸ specifying that this policy would, at a minimum, include automatic suspension of a recruiter's license once DLSE concludes that a recruiter has charged a worker an illegal fee, regardless of the party within the recruiter's supply chain who charged the fee. The recruiter should be required to reimburse all aggrieved workers for any such illegal fees, and confirmation of the reimbursement should be made as a prerequisite to the recruiter's regaining a license to operate in California. In addition, the zero-tolerance policy should state that, in cases of a violation of a worker's employment contract, a worker will be entitled to receive back-pay and damages for the period of time between an initial violation and the time when an award is made.

In order to stay any potential deportation proceedings until after the Labor Commissioner completes its investigation of any alleged workplace violations, we recommend that the Commissioner invoke the Memorandum of Understanding between the U.S. Departments of Labor and Homeland Security when needed.¹⁹ If complaints are not filed or resolved prior to a worker's departure from the U.S., DLSE should still initiate or continue an investigation of the complaint in question, regardless of the reasons for or circumstances surrounding the complainant's departure. In these cases, investigations should include phone calls or Skype interviews with the complainant. This policy should be clearly written into the final regulations.

5. Fees Sufficient to Cover the Cost of Both Registration Process and Enforcement

¹⁸ The listed examples of remedies provided under a zero-tolerance policy are not intended to be comprehensive. Rather, the Labor Commissioner should apply the full range of penalties and remedies available under the law, including revoking the licenses of foreign labor, collecting fines, issuing injunctions, and ordering back pay, damages and/or reinstatement to harmed workers.

¹⁹ See <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>.

Currently, the Cost Sheet for the draft regulations indicates a cost of \$95 for the registration process.²⁰ This is well below the \$600 charged in the farm labor recruiter context, and in fact a \$500 registration fee was deemed by the Governor in his 2013 veto message of SB 516, SB 477's predecessor, to be insufficient to cover the cost of setting up the new system.²¹ New language in SB 477 required DLSE to ensure that the "person has paid to the commissioner a registration fee and a filing fee in a total amount the commissioner determines is sufficient to support the ongoing costs of the program."²² The 2013 Dep't of Finance Analysis of the proposed legislation estimates a first-year outlay of \$934,000 to establish the program, including drafting the implementing regulations and establishing the online registration system, with a reduction to \$604,000 in operating and maintenance costs for subsequent years. The Department also offered several alternative fee structures for meeting these costs, including a uniform fee per contractor method and a uniform fee per recruited worker. The Department estimated that approximately 963 contractors would register, requiring a \$970 fee per contractor to meet the costs of the program, or a \$10 fee per recruited worker based on its estimate of 97,500 workers, if the per worker method were chosen.

Especially given DLSE's restriction of the program to H-2B visa holders only, the \$95 suggested fee is woefully inadequate to cover the costs of the program as estimated by the Department. The \$250 to \$2,500 fee paid by registrants in the garment manufacturing context provides a more realistic starting point for calculating a reasonable fee for recruiters. Given that those figures have not been updated at least since 1999, they should at a minimum be updated to reflect current costs. Moreover, as the auditing, monitoring, educational and training programs required under the law also incur costs, they must be considered in establishing the appropriate fee so that all the costs associated with the law are covered.

Accordingly, we suggest fees ranging from \$2,500 to \$10,000, to be determined based on: 1) the size of the labor contractor's business, as is the case for establishing the amount of bond that must be posted, and 2) the total costs of all the programs required under the law.

As detailed above, a more transparent online recruiter registry that enables workers to write reviews is needed on DSLE's website. Notice, a hotline and a robust complaint system, and audits and investigations are necessary to ensure the intent of the law in protecting workers from abuse and human trafficking is implemented and effectively enforced.

The statutory language makes clear that the Labor Commissioner is obligated to cover the costs of this new system by proposing a proper fee. In proposing a fee of \$95, DSLE has not considered the above

²⁰ See Dept. of Industrial Relations, Foreign Labor Contractor (FnLC) Registration, Proposed Fee, (Updated February 2017), available at http://www.dir.ca.gov/dlse/regulation_detail/Cost_Sheet_for_FnLC_Registration.pdf.

²¹ Governor Brown Veto Message (Jan. 1, 2010), available at https://www.gov.ca.gov/docs/SB_516_2013_Veto_Message.pdf.

²² See new Business and Professional Code Section 9998.1.5(b)(4).

listed obligations and must address in the final regulations a proper fee to cover the costs associated with this new protection for internationally recruited workers coming to California.

In conclusion, we recommend that DLSE correct the two fundamental errors in the proposed regulations by (1) broadening the scope of the law to cover all visa categories and sectors except those explicitly exempted under the law, and (2) strengthening and fully funding the enforcement mechanism that is so critical to the law's meaningful implementation. For further information, please contact Stephanie Richard, Policy & Legal Services Director, CAST at stephanie@castla.org.

Sincerely,

A handwritten signature in black ink, appearing to read "K Buck". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kay Buck, CEO CAST

ADDENDUM - Model Form

Department of Industrial Relations DIVISION OF LABOR STANDARDS ENFORCEMENT	OFFICE USE ONLY TAKEN BY: _____ DATE FILED: _____ INDUSTRY: _____
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Please print legibly or type. Fill out this form if you would like to report a violation of the Foreign Labor Contractors Registration Act, CA. Bus. & Prof. Code Sec. 9998 et seq. by a foreign labor contractor or an employer.

REPORT OF LABOR LAW VIOLATION

SECTION 1. REPORTING PARTY (INDIVIDUAL OR REPRESENTATIVE)

NAME OF REPORTING PARTY: _____
 NATIVE LANGUAGE: _____ INTERPRETER NEEDED? YES NO
 REPORTING PARTY CURRENTLY IN UNITED STATES? YES NO
 U.S. ADDRESS: _____ CITY: _____
 STATE: _____ ZIP: _____ HOME PHONE: (____) _____ CELL/OTHER PHONE: _____
 (____) _____ E-MAIL (if available): _____
 INTERNATIONAL ADDRESS: _____
 CITY: _____ STATE/PROVINCE: _____ COUNTRY: _____
 ZIP: _____ HOME PHONE: (____) _____ CELL/OTHER PHONE: _____
 (____) _____ E-MAIL (if available): _____
 If you are represented by a lawyer or other advocate, enter your ADVOCATE and ORGANIZATION information:
 NAME: _____ ORGANIZATION: _____
 NAME: _____ ADDRESS: _____
 CITY: _____ STATE: _____
 ZIP: _____ HOME PHONE: (____) _____ CELL/OTHER PHONE: _____
 (____) _____ E-MAIL (if available): _____

SECTION 2. FOREIGN LABOR CONTRACTOR (FLC) AND EMPLOYER REPORTED

FLC BUSINESS NAME: _____
 ADDRESS: _____ CITY: _____
 STATE: _____ ZIP: _____ PHONE: (____) _____ TYPE OF BUSINESS: _____
 TOTAL EMPLOYEES: _____
 ENTITY TYPE: CORPORATION INDIVIDUAL PARTNERSHIP LLC LLP OTHER (explain): _____
 OWNER'S NAME: _____ NAME AND JOB TITLE OF PERSON IN CHARGE: _____
 CHARGE: _____
 FLC's VEHICLE LICENSE PLATE NUMBER: _____

	ADDRESS CITY, STATE, ZIP	FLC STILL OPERATING THERE?	BUSINESS HOURS	TOTAL EMPLOYEES
FLCs MAIN WORK LOCATION		<input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> UNKNOWN		
OTHER WORK LOCATION (if any, whether or not you worked there)		<input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> UNKNOWN		
OTHER WORK LOCATION (if any, whether or not you worked there)		<input type="radio"/> YES <input type="radio"/> NO <input type="radio"/> UNKNOWN		

EMPLOYER BUSINESS NAME: _____
 ADDRESS: _____ CITY: _____
 STATE: _____ ZIP: _____ PHONE: (____) _____ TYPE OF BUSINESS: _____

