Meeting the Legal Needs of

Human Trafficking Victims:

An Introduction for Domestic Violence Attorneys & Advocates

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Human Trafficking Victims: *An Introduction for Domestic Violence Attorneys & Advocates*

Authors:
Jean Bruggeman & Elizabeth Keyes

Editors:
Amanda Kloer
Irena Lieberman
Robin Runge

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Preface

The American Bar Association is pleased to provide you with *Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates*, which we hope will serve as an important and timely resource for you in your practice representing human trafficking victims. This publication was developed pursuant to a generous grant from the ABA Enterprise Fund, as part of a collaborative effort by several ABA entities aiming to provide attorneys with leadership and training to better represent victims of human trafficking.*

Human trafficking and domestic violence are crimes which occur at alarming rates in the United States. Notably, there is also a high co-occurrence of these crimes. Many victims of human trafficking are also victims of domestic violence and many victims of domestic violence have also been trafficked. However, the legal needs of, and remedies available to, victims of domestic violence and human trafficking can be distinct. As a result, it is imperative that attorneys who represent victims of domestic violence are able to identify if their clients are trafficking victims as well, and be familiar with the range of legal remedies available to human trafficking victims as well as the relevant resources in their communities.

The impetus for the creation of this publication came from the many domestic violence attorneys who contacted the ABA Commission on Domestic Violence seeking information about human trafficking and wanting to ensure that they were providing comprehensive legal assistance to their clients.

Like domestic violence cases, human trafficking cases are often complex and multi-dimensional. This guide serves as an overview of the unique issues and remedies which are often present in such cases, and is not intended to be comprehensive. We have included references to many other resources on related topics throughout.

Through this guide, we hope to support your efforts to serve a very vulnerable population in desperate need of high-quality legal assistance. We applaud you for the heroic work that you do on their behalf.

Regards,

Karen Mathis & Laura Stein
Honorary Co-Chairs
American Bar Association Civil Legal Remedies for Human Trafficking Victims Project
April 2009

*The ABA Enterprise Fund collaborating entities are the Commission on Domestic Violence, Commission on Immigration, Rule of Law Initiative, Center on Pro Bono, Commission on Youth at Risk, Section of Individual Rights and Responsibilities, and the Center for Human Rights.

Author Biographies

Jean Bruggeman is the Director of the Community Legal Interpreter Bank, a project of Ayuda in Washington, D.C. The Bank, supported by an appropriation from the D.C. Council, provides trained legal interpreters to civil legal service providers in the District of Columbia. The Bank includes specialized training for interpreters working within the attorney-client context, testing of interpreter proficiency, and training for providers on the ethical and legal implications of serving Limited English Proficient (LEP) and Deaf and Hard of Hearing communities.

For six years, Jean was the Survivor Services Department Director for Boat People SOS, a national Vietnamese community-based organization. Jean led the development and implementation of the Community Against Domestic Violence and Victims of Exploitation and Trafficking Assistance Programs. She supervised the legal and social service staff, conducted outreach and education within the Vietnamese community, and provided training and technical assistance to service providers around the country. Jean coordinated the filing of T visa applications for over 200 human trafficking victims in the *U.S. v. Kil Soo Lee* garment factory case, in collaboration with over 40 attorneys in more than 20 states. All applications were approved.

Jean graduated from the Georgetown University Law Center and was awarded a Women's Law and Public Policy Fellowship to serve as the VAWA Attorney at Ayuda in Washington D.C. in 2000. During her fellowship year, Jean represented over 50 battered immigrant women, edited the 4th edition of Ayuda's VAWA Manual, and developed a pro bono project for the representation of battered immigrant women. Jean also holds a B.A. in Sociology and Anthropology from Bryn Mawr College.

Elizabeth Keyes is a Supervising Attorney at WEAVE (Women Empowered Against Violence) in Washington, D.C., where she specializes in providing legal services to immigrant survivors of domestic violence, in the areas of immigration and family law. Since starting at WEAVE in June 2007, she has worked with 50 immigrant domestic violence survivors, including several trafficking survivors who she assisted with their protection order, custody and child support cases, as well as working on the many immigration remedies available to these clients.

Prior to working at WEAVE, Elizabeth spent three years as a Skadden Fellow and Staff Attorney at CASA of Maryland, working on the civil and immigration aspects of human trafficking cases, litigating in state, federal, and immigration courts. She focused particularly on trafficked domestic workers, and their exploitation by diplomats. Before law school, Elizabeth spent several years working on African policy and development issues with Catholic Relief Services, the World Bank and the United Nations Development Program, throughout Africa. Elizabeth received a law degree *magna cum laude* from Georgetown University Law Center, a Masters in Public Affairs from Princeton University, and a B.A. in African Studies from Carleton College.

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Introduction

What Will I Learn From This Guide?

It is our hope that as a result of reviewing this guide, you will be better able to:

- ➤ Recognize trafficking victims among your existing domestic violence caseload;
- ➤ Identify the key civil legal remedies and other issues that you will need to explore in order to effectively assist human trafficking victims; and
- ➤ Identify and use other resources to pursue specific legal remedies and secure social services and other benefits for your clients.

Just as the experiences of domestic violence and human trafficking victims overlap, so do the available remedies. Some civil and immigration remedies are available to victims of all forms of abuse, while others are available to only a portion who met certain requirements. Exploring these intersections will allow you to think more holistically and creatively about legal remedies and auxiliary services available to clients.

The Need for Competent Legal Representation in Civil Law Matters Involving Human Trafficking

The issue of human trafficking has begun to receive more and more attention in recent years. Laws specifically designed to prevent it from occurring, protect and support its victims, and hold perpetrators accountable have been enacted. As a result, new civil causes of action and social services are available to victims. Collaborations at the state, local, and federal levels within and among government agencies as well as service providers have emerged and have provided victims with enhanced community-wide safety nets.

Despite these advances the civil justice system is still inaccessible to many trafficking victims. They are largely unaware of the legal recourse and services available to them; psychological trauma, threats to their lives and safety, and lack of resources often prevent them from seeking help. Without assistance and support, victims who do manage to escape are at risk for being re-trafficked.

Because anti-trafficking laws are still relatively new, too few attorneys possess the depth of knowledge necessary to competently, safely, and holistically assist victims. In particular, lawyers must be prepared to plan for the safety of their clients, employees, and others.

Promoting the competence of domestic violence attorneys who represent victims of trafficking, and giving them the tools they need to identify victims among their clients will better enable victims to seek the justice that they deserve. That is our purpose and our goal in producing this guide.

As a Domestic Violence Attorney/ Advocate, Why Should I Learn About Human Trafficking?

There is much to be gained from cross-training attorneys and advocates working with victims of domestic violence and human trafficking. Serving an individual client through both a domestic violence and human trafficking lens increases the likelihood that the entirety of the client's needs will be addressed appropriately. Clients who have access to a larger field of experienced attorneys will be more likely to achieve a measure of justice. Similarly, attorneys who develop a larger, better-rounded skill set and diversify their daily work will be better equipped to provide the most

comprehensive and appropriate legal services to all of their clients. An added benefit for attorneys is broadening their expertise and professional development, which often leads to increased job satisfaction.

The Overlap of Domestic Violence and Human Trafficking

As an attorney or advocate serving victims of domestic violence, it is likely that you have already served trafficking victims, without you or your client necessarily framing the case as such. There are several common ways in which domestic violence and human trafficking overlap: there are individuals whose experience with domestic violence makes them vulnerable to traffickers; there are trafficking victims who are vulnerable to domestic violence upon their escape from trafficking; and there are the "intersection" cases which contain the elements of both domestic violence and human trafficking, occurring simultaneously.

In reading descriptions of these three types of situations, you may recognize some of your current or former clients. We encourage you to use this information with insights about prior cases you have handled in order to adapt your intake and screening tools to ensure that you identify these cases in the future.

People experiencing domestic violence are often vulnerable to traffickers, especially when economic abuse is part of the power and control dynamic in which a victim is caught. Many trafficking victims explain that they were willing to take a job abroad, or to accept unclear or risky employment conditions, as it was the only way to earn enough money to be able to care for their children without an abusive spouse's economic support. Other victims recount that they were willing to accept the risks because they already were facing great danger at home. Where abuse intersects with poverty, human trafficking is more likely to occur. This pattern of victimization will be easy for domestic violence attorneys familiar with the cycle of violence to recognize.

Similarly, trafficking victims are often vulnerable to domestic violence, especially if they escaped their trafficking situation unassisted or unsupported. Trafficking involves a deprivation of liberty, financial resources and independence, as well as emotional and physical abuse. Victims are often left in poverty with few marketable skills and greatly damaged self-esteem. Traffickers, like perpetrators of domestic violence, often use isolation to increase their power and control, leaving victims with no social network or support system. Trafficking victims who also lack legal immigration status are especially vulnerable to repeat victimization. A thorough discussion with a domestic violence client may reveal a past experience as a human trafficking victim, which may or may not have been previously recognized.

CASE STUDY

Carmen came legally to the United States to work as a housekeeper for a family of diplomats.[1] The husband sexually assaulted her, and the family only paid her $50 a month. The wife yelled at her for the smallest perceived shortcoming and made Carmen work 12 hours each day. Carmen spoke little English and only left the house to go to religious services with the children of the family. She finally found someone at her church to talk to about her situation, a man in the choir, who offered her sympathy and found her a place to stay if she decided to leave. When she finally left, she moved in with his sister-in-law. They began dating within a few weeks, but he quickly became

[1] Throughout this guide, names and identifying details have been altered to preserve confidentiality.

violent toward her and said she owed him everything for his help in getting her away from the diplomats. By this time, however, Carmen knew other women at her church and was able to get help. Carmen was a human trafficking victim, whose trafficking made her vulnerable to the domestic violence that she encountered upon escape.

Finally, the most extensive form of overlap is the client who is being trafficked within an intimate partner relationship.[2] These situations are referred to as "intersection" cases, as they represent a direct intersection between domestic violence and human trafficking. While each case is unique, intersection cases share many characteristics. First, they involve intimate partner relationships. Second, they involve forced labor and/or commercial sex. Third, they are complicated. Often, there is a complex emotional relationship between the abuser/trafficker and the victim that can prevent her from seeking assistance, decrease the opportunities for support and assistance from her community, and cause confusion for law enforcement and benefits-granting agencies. The emotional ties and other complexities inherent in these cases are very familiar to domestic violence attorneys, and intersection cases are more common than many people realize.

CASE STUDY

Charu met her husband while they were both students at the University of Indiana.[3] They married within months and Charu thought that she had found the traditional groom of her dreams, as he was living with his parents. However, it became shockingly clear to Charu, almost immediately, that what had been a love match for her was going to be nothing more than exploitative housekeeping for this family. Her mother-in-law forced her to do all the family's cooking, laundry and cleaning. Charu had studied accounting, so her husband made her help for 10 hours a day in his small business, without compensation. He also forced himself on her sexually, including once immediately after she suffered a miscarriage. Twice, he struck her with such force that she fell on the floor. He told her that he would tell her family that she was a lazy, infertile whore if she complained or found outside employment. Charu was a victim of human trafficking within her intimate partner relationship.

[2] "Intimate partner relationship" includes, for the purposes of this guide, any dating or marital relationship. Trafficking can also exist in other types of relationships including families and friendships, but this guide focuses on cases within a dating, marital or other intimate partner relationship. Many of the same remedies and services will be available for other types of relationships.

[3] *See supra* note 1.

CHAPTER ONE
Identifying Potential Human Trafficking Cases

What is Human Trafficking?

Human trafficking involves a pattern of power and control used to extract labor or services, often, but not always, for financial or material gain. U.S. law, through the Trafficking Victims Protection Act (TVPA), defines trafficking as:

> Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; 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.[4]

One of the most common misconceptions about human trafficking is that it is primarily a crime of movement. It is not. In fact, the law does not require any movement or crossing of jurisdictional boundaries for a trafficking crime to occur. Human trafficking is primarily a crime of exploitation. Human trafficking occurs when an individual's freedom is curtailed and labor or other services are extracted through force, fraud, or coercion by another individual. This is an important nuance to keep in mind when working with clients who have not been transported across borders, as they may still be trafficking victims.

Another important element to trafficking is the other party's gain; for a crime of trafficking to occur, one person must materially benefit from the exploitation of another by receiving something of value. While traffickers often benefit from the money that they earn from the exploited labor of the victim, this component is fulfilled if anything of value is exchanged, such as food, drugs, goods, and labor.

CASE STUDY

Sally was born and raised just outside of Chicago, in a small middle-class suburb. Sally's mother died when she was 16, leaving her confused and angry at a difficult time. Sally's boyfriend, Tom, was 18 and already living on his own. Within a year Sally was living with Tom and helping to pay the bills with a part-time job at a convenience store. That winter, construction jobs were hard for Tom to find, and the couple were about to be evicted. Tom conviced Sally that she owed him for all of the months of rent he had paid. He told her that she could make some quick money by having sex with a few guys; that no one would need to know; that Tom would protect her. To get through it, Sally got drunk. The next time, she got high. Each time, Tom took all of the money. He said it was safer if she didn't have to handle the money. When Sally told Tom she wanted to stop hooking, he would hit her. Then he would get her high. Then he would remind her of those months after her mother

[4] Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 (8) (2008).

died when he held her all night long while she cried. He told her that he loved her, but that they needed the money; that she owed him. Sally is a U.S. Citizen victim of domestic violence and trafficking. Tom is using emotional coercion and physical violence to enslave Sally, but since Sally is a minor these factors are not required for a criminal prosecution of Tom as a human trafficker. Sally may be eligible for a range of social and legal services, but will not need immigration services.

Finally, people of all nationalities are trafficked, both within their own countries and/or to other "destination" countries. The TVPA created special remedies for trafficking victims who are non-U.S. Citizens or Lawful Permanent Residents (LPRs). These remedies include immigration options and social services.

CASE STUDY

Elizabeth lived with her abusive husband in Benin, and he denied her the money she needed to adequately provide for their children.[5] Desperate to leave the violence and find a way to support her children, she responded to an ad that promised to place women in housecleaning agencies in the United States, where they would earn $500 per week. She accepted the job, only to find herself trapped in involuntary servitude working in a restaurant in New York City for a man who failed to pay her, confiscated her documents, threatened to have her arrested if she complained, and denied her any contact with the outside world, including her children in Benin. Elizabeth was a domestic violence survivor who was vulnerable to, and became a victim of, human trafficking.

Special services for trafficked youth, including U.S. citizens, were authorized by the Trafficking Victims Protection Reauthorization Act of 2005.[6] Similar to the creation of the Violence Against Women Act (VAWA) self-petition process for battered immigrant women,[7] specialized immigration remedies have been developed to prevent the use of immigration status as a weapon by traffickers. The specialized social services were made available because undocumented victims were not otherwise eligible to receive many public benefits. However, immigration or citizenship status is irrelevant to the definition of human trafficking. U.S. citizens of all ages may be trafficked in a variety of settings and may be eligible for a host of civil legal remedies and federal, state, and local social services (including food stamps, WIC and Medicaid).

A Note on Gender

Human trafficking, like domestic violence, affects all genders and ages within all types of relationships. In this guide, however, we will generally use female pronouns when speaking of clients because domestic violence providers are most likely to encounter female trafficking victims within their predominantly female client population.[8] We note, however, that the type of labor or services for which victims are exploited is certainly gendered. Women and girls are more often trafficked for commercial sex, domestic servitude,

[5] *See supra* note 1.

[6] Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, (codified in scattered sections of 18 and 22 U.S.C.).

[7] *See* Chapter Two of this guide for a more comprehensive discussion of this remedy.

[8] *See*, *e.g.,* Bureau of Justice Statistics, Crime Data Brief, Intimate Partner Violence, 1993-2001, (2003) (reporting that 85% of victims of intimate partner violence are women, and 15% are men).

and garment factory work; whereas men and boys are more often trafficked for machine factory and farm labor. This guide, however, focuses on clients at the intersection of domestic violence and human trafficking where, in our experience, females are the majority of the victims. We in no way intend to minimize the reality that men can be, and are, victims of domestic violence and human trafficking, but for ease of reading we have selected this approach.

How Do I Identify Human Trafficking Victims Among My Clients?

Domestic violence attorneys have a unique opportunity to identify victims of human trafficking and to assist them in seeking legal relief.

First, it is important to educate yourself on the dynamics and circumstances common to human trafficking situations. Learn the definition and the warning signs and understand that human trafficking occurs in contexts other than those most often depicted by the media. For more general information about human trafficking, please see the resource section of this guide.

Second, review your intake forms and procedures. Consider adding some additional questions, such as those in the text box on this page.

Interview Questions

The following questions may be useful in screening your clients for human trafficking.

- Have you ever been forced to work?
- Did anyone ever threaten to hurt you or your family if you did not work?
- Did anyone force you to cook or to clean the house?
- Were you lied to about the kind of work you would be doing?
- Did anyone take your money?
- What would have happened if you did not give that person your money?
- What did you fear would happen if you left?
- Were you ever forced to do something sexual for your abuser or someone else?
- Have you been involved in commercial sex?
- Did you know others in the same kind of situation as you were in?
- Were you able to keep your identification documents with you, or did someone take them from you?

And for immigrant clients:

- How did you enter the United States?
- Were you able to keep your passport, visa or identification with you, or did someone take it from you?
- Were you working to pay off a smuggler or other debt?
- Were you free to find another job to pay the debt, or were you forced to work at a certain place?

Third, prepare yourself to represent trafficking victims, or to refer them to another attorney. The following chapters provide an overview of the legal remedies available to trafficking victims, some key practice pointers, and some important resources for practitioners representing trafficking victims. Whether you intend to represent trafficking victims yourself or refer them to others, you will need to develop a network of local resources. Victims will need access to legal, social service, medical and mental health providers who are familiar with human trafficking and who are willing and able to serve them. This area of the law is relatively new, so services can be difficult to find. Collaboration is essential. Fortunately, there are national resources available to provide technical assistance and to guide you to local organizations with expertise in social and legal services for trafficking victims. For more information about national and local resources, please see Chapter 4.

How Cultural Beliefs and Practices Can Affect Trafficking Case Recognition

Thuy's aunt introduced her to Thang, a Vietnamese man who had immigrated to the U.S.[9] They corresponded by phone, mail and email for six months until Thang asked Thuy to marry him. Thuy was excited, but knew that her parents' permission was critical. Thang arrived in Vietnam and stayed with Thuy's family for two months. With Thuy's parents' approval, Thang and Thuy had a traditional Vietnamese engagement ceremony. Families and friends of the couple attended, including over 250 guests. As is common after an engagement ceremony, Thuy then moved in with Thang's family (an aunt and uncle who lived several hours away from Thuy's family in Vietnam) and lived there for four months while waiting for her visa. Once Thuy finally arrived in the U.S., she was excited to begin building a life with Thang. However, Thang was not the loving suitor he had been while visiting Vietnam. He left Thuy living with a friend, claiming that he needed to finish preparing their marital home. She was forced to work in the friend's restaurant for 12 hours a day and was not paid. Thang would visit weekly and spend the night with Thuy. She believed it was her duty to repay the friend for her room and board and to show that she was a hard-working and obedient wife. Thang warned her that if she displeased him she would be returned to her family in Vietnam, a potent threat for a traditional Vietnamese woman. Thang threatened that he had sponsored Thuy and that he could have her deported. He pointed out that the Vietnamese engagement ceremony was meaningless to U.S. authorities and that if she did not please him he would not complete the marriage and Thuy's visa would expire. Thuy knew that her family would be devastated if she returned home from the U.S. without a husband. Since the entire community had attended her engagement ceremony, if she returned they would believe that she was a bad woman and worthless as a wife. The government had removed her from her family's household registration when she moved to the U.S. If she returned, she would face discrimination in housing, schooling, and employment.

Thuy is a victim of trafficking within her intimate partner relationship, but this may be a difficult case to present for criminal prosecution or immigration relief. Since Thuy is not married to her abuser, she is not eligible for a VAWA self-petition, although this wouldn't be a bar for the U or T visa. Because she was not enslaved through force or threats of force, but rather through cultural factors unique to her community, immigration and law enforcement officials may not recognize human trafficking without extensive education and advocacy.

[9] *See supra* note 1.

The Special Complexities of Intersection Cases

Recognizing cases and clients that raise issues related to both domestic violence and human trafficking is critical and these cases are complex. These cases may present as either pure trafficking or pure domestic violence cases or even simple wage and hour cases. As is common for domestic violence victims, clients may be unwilling to describe their relationship, uncomfortable or emotionally unable to discuss the abuse in detail, or unaware that the abuse is unlawful. The legal requirements for relief may not coincide with the elements of the relationship that were most painful for the client and the words she uses to express them. Cultural beliefs (held by the client, advocate, law enforcement officer or prosecutor) about the role of women in relationships also can serve to camouflage these cases.

The existence of an intimate partner relationship, especially marriage,[10] generally leads advocates, attorneys, and law enforcement to assume an abusive or exploitative situation is domestic violence and to discount human trafficking. Do not let the existence of the intimate partner relationship and of familiar legal remedies end the inquiry. The client may have additional remedies available and pursuing them may not only benefit her, but result in the protection of other women from the same fate.

Family-Based Immigration: A Modern Day Slave Route

In an attempt to evade increasing immigration enforcement, some traffickers look to family-based immigration options to entrap a slave from overseas. These options include both marriage and adoption. A marriage, for example, may have been arranged by family members through family friends or acquaintances, via an internet connection (including "mail order bride" websites or marriage brokers) or have developed out of a romantic relationship. The couple may have known each other or each other's families for many years or have only met at their wedding ceremony. Enslavement also occurs through adoptions, when a child is adopted legally, but the adopting family intends only to force the child to engage in labor or commercial sex. The victim may believe that he or she is indebted to, and/or legally bound to the trafficker. The victim may believe that he or she cannot leave without fear of deportation or imprisonment. The victim may have family ties that would lead to great shame, severe ostracism, or further abuse upon ending the relationship.

To determine whether a case constitutes a domestic violence and human trafficking intersection case, two key components must be satisfied:

1. **Presence of an intimate partner relationship.** The victim is/was in an intimate relationship with the abuser/trafficker; and
2. **Presence of labor, commercial sex or "involuntary servitude"[11] performed under force, fraud or coercion, or commercial**

[10]Marriage has a special connotation in many cultures of being beneficial, loving, safe, and important to society. These associations make it especially difficult for many people to identify trafficking within the relationship.

[11]"Involuntary servitude includes a condition of servitude induced by means of, "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint." 22 U.S.C. § 7102(5)(A) (2008).

sex involving a minor. This includes any commercial element in which the abuser/trafficker benefits from the victim's labor. The labor performed may be highly varied, including cleaning the home, performing sexual acts for the abuser or others or working in a business owned by the abuser, his family, or others. The victim may be unpaid, underpaid, or face confiscation of her pay. The labor is mandated by the abuser through force, threats of force, or psychological coercion. The abuser may threaten deportation, arrest, harm to family members in the U.S. or elsewhere, or damage to the victim's reputation (or the reputation of her family). Sex trafficking of a minor does not require a showing of force, fraud or coercion.

Practice Pointers for Intersection Cases

Keep the following tips in mind as you explore potential intersection cases:

Ask about all kinds of work: Clients may not describe themselves as having been forced to work, but a discussion may reveal that when the client was sick and unable to clean the house, she was beaten. You may find that she was expected to clean not only the home that she shared with the abuser, but also that of the abuser's mother/sister/friend. You may find that she was forced to work in the business operated by the abuser or his family members. You may find that seemingly routine housework was required to an abusive degree. For example, the victim was beaten if any dust was visible.

Ask who chose the work: Exploitative labor situations abound with low pay and terrible working conditions. The key distinction between labor exploitation and trafficking is that trafficking victims cannot choose their employer or decide when to leave. A domestic violence victim may be working at her abusive spouse's restaurant because she does not have a car or because she shares in the proceeds. A trafficking victim works in the restaurant because she is told that if she tries to get another job she will be thrown out on the street or because she is taken there every day and told she cannot leave until she finishes the dishes from the dinner service.

Ask about sexual abuse: Sexual abuse is always difficult for a client to discuss, but when you do discuss it you may find that the client was forced to engage in sexual acts with others as repayment for her abuser's debt or for payment (collected by her abuser). U.S. law describes sex trafficking as any sexual act induced by force, fraud, or coercion for which anything of value was exchanged.[12] Sex trafficking of a minor does not require force, fraud, or coercion, just a sex act in exchange for something of value. The premise of the law is that sexual consent from a minor is not possible.

Follow the money: If the client received any money for any labor or services, but the money was taken by the abuser, ask more questions. If she was working, but not keeping any of the money, find out why. This is a classic marker of trafficking—labor without adequate pay. If she really enjoyed her work but believed it was best for her spouse to handle the finances of the home and generally agreed with his financial decisions, it is probably not trafficking. Any situation short of that is potentially trafficking, but the coercion may be very subtle and culturally embedded.

Once you have identified an intersection case, you have a lot of decision-making to do. There are a variety of remedies available, but you may have to choose which to pursue and in what order. Keep in mind that the client may have remedies that

[12]"Sex trafficking means, "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." 22 U.S.C. § 7102(9) (2008).

are unrelated to the victimization. For example, immigration remedies unrelated to victimization include temporary protected status, a family-based visa, a student visa, and/or an unrelated asylum claim. Those options are important to keep in mind but are thoroughly explored in other training materials. Please see the resources section for additional information on these remedies. Here, we will discuss only the remedies that directly relate to human trafficking and domestic violence.

Law Enforcement Referrals: What Will You Do?

Domestic violence programs around the country are increasingly being asked by law enforcement agencies to serve human trafficking victims. These clients' cases may be trafficking but may or may not be domestic violence cases. The victims are usually (but not always) women. The law enforcement agency is trying to find the most appropriate provider to serve these high-need clients, and there may not be a trafficking program in your area. Referrals from law enforcement tend to be for clients who were identified during a workplace raid or an anti-prostitution enforcement action. Before accepting such a referral, your agency should consider the ways in which trafficking clients may be different from domestic violence clients. Some key distinctions include:

- Trafficking victims who were "rescued" from the trafficking situation may not identify themselves as victims. They may be skeptical, or even resentful, of your services;
- The clients may have been arrested and detained in a jail for some time before being referred to you. They may think that you are connected to law enforcement and may have trouble trusting you;
- The clients may be emotionally connected to the trafficker and eager to return to the trafficker as soon as possible. They may be contacting the trafficker by phone and revealing your location;
- The clients should not participate in group therapy or discuss the trafficking situation with anyone who does not have a legal privilege (such as a lawyer or doctor);
- It is unlikely that law enforcement will tell you the whole story, either because they do not know it yet or to protect their ongoing investigation;
- Law enforcement may not understand that you have privacy protections for your clients and may expect that you will actively assist with their investigation;
- Law enforcement may not understand that you run a voluntary program and may expect that you will keep the client with you regardless of her desire to leave your facility.

These clients are often in need of very intensive case management and may need immediate medical and mental health care. Increasing access to comprehensive services for trafficking victims is an important goal. Your agency may be able to expand services to accommodate this incredibly vulnerable population, but it must be done thoughtfully. Begin to explore these issues with your organization before the referral comes to your door, and you will be better prepared to set reasonable limits with law enforcement and to provide appropriate services to these clients.

CHAPTER TWO
Civil Legal Remedies for Human Trafficking Victims

Litigating Civil Actions for Trafficking and Domestic Violence Victims

Once you identify a trafficking victim among your clients, you may choose to take the case yourself or refer the client to another attorney depending on a variety of factors, including the availability of resources and expertise. The following is an introductory roadmap to the civil remedies that may be available to your client should you decide to take the case.

Civil litigation can be an enormously powerful tool to seek redress for the harms done to trafficking and domestic violence victims. With some remedies, litigation may restore earnings, help victims pay off trafficking-related debts, or give victims a sense of justice in punishing the trafficker. In all cases, the victim drives the decision-making; as opposed to being the victim-witness in a criminal case controlled by the prosecution, the client is the center of the civil case. This role can be particularly vital in the process of empowerment.

It is crucial, however, to advise the client about the potential negatives of civil litigation. It can be time-consuming and drag on well past the time that the client just wants to move on with her life. It can be arduous, particularly during the discovery phase, requiring that the client provide ever greater levels of detail about her story. It can be frightening to face the trafficker across the litigation table, in a deposition or during trial, and it may increase the risk to the victim's safety. All of these aspects need to be discussed with the client before considering whether to pursue a civil cause of action at all.

There are many different civil claims that can be brought on behalf of a trafficking victim. In intersection cases, a victim may benefit from a civil protection order. Causes of action exist at the federal and state levels, and in any given case, a different combination of these may be appropriate. Just like any complex civil litigation, strategy and timing are essential to effective representation. This chapter is not intended to be a comprehensive exploration of those issues. Several other extensive, more appropriate resources are available to assist you if you decide to litigate a case on behalf of a victim of trafficking.[13] Please see Chapter 4 for information regarding additional, similarly helpful resources.

Please note that most of these claims may be brought in the same lawsuit. It is not necessary to file, for example, one case for wages and another for assault. One single case might have a dozen or more different causes of action. Statutes of limitation for some of these causes of action run fast, however, so it is best to determine if your client is eligible for this range of remedies quickly.

[13]One popular resource is Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Trafficking* (S. Poverty Law Ctr. 3d ed.) (2008), available at http://library.lls.edu/atlast/HumanTraffickingManual_web.pdf.

The Trafficking Victims Protection Reauthorization Act and State Law Trafficking Claims

The Trafficking Victims Protection Reauthorization Act of 2003 provides a specific mechanism to allow many trafficking victims to file civil lawsuits.[14] The claim must allege one of three kinds of harm: (1) forced labor, (2) trafficking into servitude or (3) sex trafficking by force, fraud, or coercion, or of children under 18.[15] The 2003 TVPRA does not specify remedies but permits victims of forced labor, trafficking into servitude, or sex trafficking to seek damages generally. Punitive damages in such cases can be extensive, so this claim may provide a valuable opportunity for compensation if the underlying elements of the claim are all present. As of the writing of this guide (Summer 2009), there is no statute of limitations for filing a claim under the 2003 TVPRA.

In addition to federal claims, you may want to explore state anti-trafficking laws in your jurisdiction. Most states have criminal code provisions making trafficking a felony.[16] Some states may also provide benefits and services for human trafficking victims while federal TVPRA claims are pending, and some have created causes of action for a civil case to recover penalties, actual damages, and statutory damages.[17] For more information, please see Chapter 4.

Employment Law Claims

Trafficking victims are often forced or otherwise coerced into slave labor, including involuntary servitude in private homes, restaurants and sweatshops, among other places. State and federal employment law protections may provide victims with much-needed economic resources, in addition to penalizing the trafficker financially. Trafficking victims may have access to employment protections from one or more of three sources: (1) federal and state wage and hour laws; (2) federal and state laws such as anti-discrimination and anti-harassment in employment; and (3) tort remedies.

Federal and State Wage and Hour Claims:

The federal Fair Labor Standards Act (FLSA)[18] and analogous state wage and hour laws provide several possible economic remedies for a victim who was denied or deprived compensation for work performed. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.[19] Covered "nonexempt"[20] workers are entitled to a federally-established minimum wage.[21]

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[14] Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), Pub. L. No. 108-193, 117 Stat. 2875, (codified in scattered sections of 8, 18 and 22 U.S.C.).

[15] 18 U.S.C. § 1595 (2008).

[16] Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], *Fact Sheet on State Anti-Trafficking Laws* (December 2007), http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsDecember2007.rev9208.pdf.

[17] To find out more about the available state remedies in your jurisdiction, see Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], *State Laws/Map of the United States*, available at http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp.

[18] Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 (2000); *see also* 29 C.F.R. §§ 500-794.

[19] For current information and overview regarding the Fair Labor Standards Act, *see* U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division *at* http://www.dol.gov/esa/whd/flsa/ (last visited September 9, 2008).

[20] 29 U.S.C. § 213(a)(1) (2004) and § 213(a)(17) (2004) provide an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, outside sales employees, and certain computer employees. All other employees (including most trafficked employees) are "nonexempt," and are therefore subject to the terms of the FLSA.

[21] 29 U.S.C. § 206 (2007).

Many states and localities also have minimum wage laws. In cases where an employee is subject to both local and federal minimum wage laws, the employee is entitled to the higher minimum wage.[22]

Covered nonexempt employees must receive overtime pay (at least 150% of regular pay) for hours worked over 40 per workweek.[23]

Importantly, FLSA applies to employees regardless of their immigration status.[24] This is important because many trafficking victims are undocumented immigrants. Moreover, courts have held that it is illegal under FLSA to report a worker to the Department of Homeland Security as retaliation for a wage and hour complaint.[25]

An employer who violates FLSA is liable to the employee for the unpaid wages and an additional equal amount as liquidated damages.[26] If the employee is successful in her FLSA claim, she can also be awarded reasonable attorneys' fees and costs to be paid by the defendant.[27] As a result, there should be experienced attorneys interested in working with you to bring these claims. Some large firms are willing to take such cases on a *pro bono* basis and donate the recovered fees to the non-profit organization which is primarily serving the client.

Federal and State Anti-Discrimination in Employment Claims: When a human trafficking victim experiences sexual harassment or sexual assault at work, either inside the building or on premises controlled by the employer (who is often also their trafficker), she may be able to avail herself of protections under state and federal anti-discrimination laws if her employer fails to take action regarding the assault or retaliates against her for reporting it.

Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits discrimination against an employee in hiring, in the terms and conditions of employment, and in firing based on sex (including pregnancy), race, national origin, religion and color, for employers with 15 or more employees.[28] Courts have also recognized that sexual harassment is a prohibited form of sex discrimination.[29] An employer can be held liable if it failed to exercise reasonable care to prevent and correct the behavior, and the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.[30]

Sexual assault may also constitute sexual harassment when the perpetrator is a supervisor or otherwise an agent of the employer, and commits an act of rape or sexual assault on the job. Rape may create a sufficiently severe or pervasive hostile environment to hold an employer liable for the

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[22] 29 U.S.C. § 218 (2006).

[23] 29 U.S.C. § 207 (2006).

[24] *See, e.g., Montoya, et al. v. S.C.C.P. Painting Contractors, Inc., et al.*, 530 F.Supp.2d 746 (D. Md. 2008); *E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (2006); *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005).

[25] *See, e.g., Sigh v. Jutla & C.C.&R's Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

[26] 29 U.S.C. § 216(b) (2008).

[27] 29 U.S.C. § 216(e) (2008).

[28] 42 U.S.C. § 2000e (2006).

[29] *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[30] *Id.*

resulting damages.[31] It may also constitute sexual harassment when the perpetrator is a co-worker or non-employee such as a customer, and the employer knew or should have known of abuse that involved the workplace and failed to take prompt and appropriate remedial action.[32] Sexual harassment laws apply to all employees, regardless of the relationship between the perpetrator and the victim.[33]

Importantly, like FLSA, Title VII applies to employees regardless of their immigration status.[34] Because lawsuits filed under Title VII provide for attorney's fees and substantial damages, it is often possible to find lawyers who will undertake these cases, if the considerable demands of a Title VII case are beyond your own resources.

Civil Rights Act of 1866 and 1870, 42 U.S.C. §§ 1981, 1983: Claims for race and national origin discrimination may also be brought under the Civil Rights Acts of 1866 and 1870. Known more broadly as section 1981 and section 1983 claims, these sections were specifically created to prevent race discrimination by private actors, but they have been applied to address discrimination based upon national origin. Section 1981 protects the rights of all persons to enter into and enforce contracts. Amended in 1991,[35] the law also provides expanded remedies for intentional discrimination. Importantly, there is no minimum size requirement, thus small businesses and companies may be sued.

Intentional Torts: Assault and Battery

In many intersection cases, there has been battery, assault, or sexual assault. One strategy in a lawsuit may be to include these intentional torts as claims within the lawsuit, for at least three reasons. First, the harms were done and including them more fully captures the harm done to the victim than a case that only seeks payment of wages. Second, these claims can yield significant damages for physical and emotional harm and punitive damages. Third, this may be the best option for sex trafficking cases or more subtle cases of labor trafficking when it may not be possible to recover wages.

The statutes of limitations for intentional torts vary by state. Therefore, these claims must be monitored carefully so that they are not lost.

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[31] *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual assault by supervisor with whom employee had a prior social relationship); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001) (serial rape on one occasion during business trip); *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1305 (2d Cir. 1995); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (every rape committed in the employment setting is also discrimination based on the employee's sex); *Jones v. United States Gypsum*, 81 FEP Cases (BNA) 1695 (N.D. Iowa 2000).

[32] *See, e.g., Little v. Windermere Relocation, Inc.*, 265 F.3d 903 (9th Cir. 2001) (rape by client); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (unwanted touching and offensive comments by co-workers); *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cases (BNA) 1334 (N.D. Ill. 1995) (harassment by employer's customer); *Otis v. Wyse*, 1994 WL 566943 (D. Kan. 1994) (harassment by co-worker); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-1026 (D. Nev. 1992) (harassment by employer's customer); *see also* 29 C.F.R. § 1604.11 (d) & (e) (EEOC guidelines confirming employers' liability for sexual harassment by co-workers and customers).

[33] *See, e.g., Fuller v. City of Oakland*, 47 F.3d 1523 (9th Cir. 1995) (holding city liable for failing to take steps to stop a police officer from harassing another officer after she ended their relationship); *Excel v. Bosley*, 165 F.3d 635 (8th Cir. 1999) (finding that sexual harassment at work by employee's ex-husband violated Title VII).

[34] Most but not all remedies apply to workers regardless of immigration status. *Compare Galaviz-Zamora, et al v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005) (holding that immigration status is not relevant to claims for wages already earned) *with Hoffman Plastic Compounds, Inc. v NLRB*, 535 U.S. 137 (2002) (holding that undocumented workers are not entitled to backpay for time that they have not actually been working).

[35] Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991).

Contractual and Quasi-Contractual Claims

A civil lawsuit may also raise contractual and quasi-contractual claims. These are important where either the promised wage was significantly higher than the minimum wage, or where the market value of the labor was significantly higher than the minimum wage.

A claim based on breach of contract simply needs to allege the basic elements of any contract case: formation of a contract, breach of contract, and harm. In a trafficking case, contracts are often fraudulently made by the trafficker but accepted in good faith by the worker. Courts will enforce such a contract when breached and when your client has suffered harm. No liquidated or punitive damages are available, however, under a pure contract claim. Generally, a contract claim seeks only compensatory damages.

A claim based upon unjust enrichment is a quasi-contractual claim recognizing that sometimes people are hired without an explicit wage being set but with an understanding that they will be paid appropriately for their services. In your lawsuit, you could seek redress for unjust enrichment when the trafficker wrongly benefits from the labor of your client. In such a case, the money sought would be equivalent to the prevailing wage for such labor, which will almost always be higher than the minimum wage and is therefore worth including in case a particular job is found not to fall within the FLSA's protections.

Similar to unjust enrichment is the principle of *quantum meruit* which allows the worker to seek compensation for work performed.

Civil Protection Orders

Domestic violence attorneys are already well aware of the utility of civil protection orders (variously known as CPOs, PFAs, peace orders, or restraining orders, depending on the jurisdiction). Civil protection orders for victims of domestic violence are available in every state, and jurisdictions have begun to enact statutes creating CPOs specifically for victims of sexual assault and stalking.[36]

Clearly, the same factors that would encourage a client to seek a CPO in any domestic violence, sexual assault, stalking or harassment case also may exist in a case that intersects with human trafficking. The CPO may be a valuable tool, especially in the short term, to assist with some of your client's immediate needs and to facilitate future legal actions. The majority of states have "catch-all" provisions in their CPO statutes that can be used for relief above and beyond the basic "stay-away" provisions. This can be extremely useful when the trafficker has control of your client's passport or immigration documents, or if your client left photos or documents behind which might help her with one of her civil claims (e.g. a marriage certificate, or an original contract). Clients also may have fled in fear and simply left behind personal items that are not replaceable (phone book, gifts, items with sentimental value). Where possible, the CPO should seek return of all of those items, especially anything that could make the client's immigration or other civil case easier.

Immigration Remedies

There are a variety of immigration remedies that may be available to victims of domestic violence and human trafficking who are non-U.S. citizen

[36]For additional information about civil protection order statutes, see the Statutory Summary Charts section of the ABA Commission on Domestic Violence website, at www.abanet.org/domviol (last visited Apr. 13, 2009).

(and generally non-LPR[37]) victims. The remedy crafted specifically for trafficking victims is the T visa. The options that exist specifically for domestic violence victims are the Violence Against Women Act (VAWA) self-petition, the battered spouse waiver, and VAWA cancellation of removal. Other options may be the U visa for victims of crime (including domestic violence, trafficking, and other crimes) and asylum.

There are other forms of permission to remain in the U.S., such as continued presence (for trafficking victims assisting a law enforcement agency with the investigation or prosecution of a trafficking case) or the S visa (sometimes called the "snitch visa" for victims or witnesses assisting law enforcement with the investigation or prosecution of organized crime), but these do not confer long-term legal status. These options are initiated by the government only and may enable your client to remain here temporarily with employment authorization while a case is being pursued against a trafficker. Depending on the particular facts of your client's situation, she may be eligible for several of these options. In most cases, it is possible for your client to pursue multiple remedies concurrently.

Please bear in mind that children may have their own immigration remedies, some of which are the same as those described in this guide and some of which are child-specific. For more information on representing trafficking victims who are minors, or who were minors during their victimization, refer to Eva Klain & Amanda Kloer, Amer. Bar Ass'n, *Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children's Attorneys & Advocates* (2008).

VAWA Self-Petition: In the normal course of events, a U.S. citizen or lawful permanent resident (LPR) may petition for a spouse or child to gain lawful permanent residency. However, in abusive relationships, the abuser often refuses (or "forgets") to complete (or even begin) this process, because he is aware that gaining immigration status removes one of the spouse's sources of vulnerability and dependence.

CASE STUDY

The story of Charu (described in the Introduction), who married her abuser/trafficker, is an example of a case where a trafficking victim also could be eligible to file a VAWA self-petition. Because her abuser/trafficker was a U.S. citizen, and they were married, Charu would be able to file an application for her green card at the same time that she files her VAWA self-petition. This may make the VAWA self-petition the remedy of choice for Charu, despite her eligibility for other kinds of relief. It might be advisable to concurrently pursue a T visa or continued presence, however, if Charu is in need of public benefits or specialized social services reserved for trafficking victims.

The Violence Against Women Act of 1994 (amended in 2000, and again in 2005)[38] recognized this problem and provided a route for abused spouses and children to petition for themselves and not be reliant upon the abuser to file the petition.

[37] Victims who are lawful permanent residents (LPRs) may not need any further immigration remedies that are specific to their victimization; they will be eligible for U.S. citizenship within three to five years and can apply independently. However, if the client may have obtained her status fraudulently (perhaps due to the abuse) or if she has family members in her home country that she would like to bring to the U.S., she may need to renounce her LPR status and apply for one of the remedies described here to correct the fraud or to more expeditiously bring the family members to the U.S.

[38] Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994), *amended by* the Battered Immigrant Women Protection Act, Pub. L. No. 106-386, 114 Stat. 1518 (2000), *and* the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-62, 119 Stat. 1990 (2005).

The spouse must show that:

1. The abuser is a U.S. citizen or LPR;
2. There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
3. There was physical or emotional abuse;
4. The petitioner resided with the abuser; and
5. The petitioner is a person of good moral character.

An approved petition will generally lead to an employment authorization document (or "work permit"), limited eligibility for federally-funded public benefits, and eventual (in some cases more immediate) eligibility to adjust to LPR status and then citizenship. Petitioners can include their children as derivative beneficiaries, and there are provisions relating to self-petitions based on the abuse of one's children. The government is not permitted to divulge information about a petition to an abuser, and the government cannot rely solely on information from the abuser in taking action against a victim. There are several excellent resources that detail this well-established remedy. See the list of resources in Chapter 4.

Battered Spouse Waiver: Sometimes the LPR or citizen abuser will petition for the spouse to gain LPR status. If the application is approved during the first two years of the marriage, the spouse receives conditional residency, which is valid for two years.[39] At the end of two years, the couple petitions *jointly* to "remove the conditions" and make the residency permanent. However, abusers often use this requirement as a tactic to assert their power and control over their spouse by refusing to file the joint petition or to follow through with the process.

CASE STUDY

Josephine was living in California when she met the U.S. citizen who would become her husband.[40] He filed for her green card after their marriage, and she was granted conditional residence. A year into their marriage, he became violent toward her. To finance his drug use, he forced Josephine to take over the daily operations of his small convenience store, and confiscated the profits. For her 14-hour days, she earned no money, and he used the store's security cameras to make sure she was not engaging in conversations with the customers. When she did, he beat her. He told her he would have immigration officials arrest and deport her if she ever left him, and he refused to file the paperwork necessary to make her conditional residency permanent. Josephine is a trafficking victim whose most immediate immigration relief is through a battered spouse waiver, although she also may be eligible for other immigration remedies.

There is a waiver of the joint filing requirement for domestic violence victims, generally referred to as the "battered spouse waiver." It permits abused spouses to petition to remove the conditions independently. A similar provision exists where a

[39]The two year conditionality is a result of the Immigration Marriage Fraud Act, which responded to concerns over immigration fraud by requiring that all marriage-based residency cases granted while the marriage was less than two years old would be required to undergo a second review two years after the first review. The same legislation created a waiver of this requirement for victims of domestic violence, the first immigration remedy created specifically for domestic violence victims. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)).

[40]*See supra* note 1.

good faith marriage nonetheless ends in divorce. Children of victims who have conditional residency may qualify to be included in this petition.

The battered spouse waiver was the first immigration remedy crafted for domestic violence victims. It was included in the Immigration Marriage Fraud Amendments of 1986.[41] It is a written petition that confers LPR status, and the petitioner needs to show that:

1. There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
2. There was physical or emotional abuse;[42] and
3. The petitioner is currently a conditional resident.

There are several excellent resources that detail this remedy. See Chapter 4 for further information.

VAWA Cancellation of Removal: For victims who are in removal (also known as deportation) proceedings, a special remedy called VAWA cancellation of removal may be their best option. The "cancellation" refers to cancellation of the removal proceedings and the granting of lawful permanent residence. The victim must prove to the immigration judge that:

1. The abuser is a U.S. citizen or LPR;
2. There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
3. There was physical or emotional abuse which occurred in the U.S.;
4. The victim has at least three years of physical presence in the U.S.; and
5. The victim and/or her parents or child(ren) would suffer extreme hardship from her deportation.

CASE STUDY

In the example of Thuy and Thang (described in the Introduction), Thuy was forced to work for her abusive spouse as soon as she arrived in the U.S. Thang, her husband, left her to live with, and work for, others. Thuy may not be eligible for a VAWA self-petition, since she did not live with her spouse. However, if Thang does marry her, and if she has been in the U.S. for three years, VAWA cancellation of removal might be an option for her, especially if law enforcement is unable to recognize that her experience constituted trafficking or if she is unwilling to report Thang to law enforcement. Many trafficking victims in intersection cases are unwilling to make reports to law enforcement because they are related to the trafficker and reporting them would bring great shame and humiliation to the family. If Thuy is not already in removal proceedings, she would have to present herself to DHS to request being placed in removal proceedings in order to apply.

This remedy is less commonly used than others because denial leads to deportation. Victims may be eligible for employment authorization ("work permit") during the removal proceedings which can last for several months to several years. A non-abused parent can file for cancellation as the parent of an abused child. However, a child cannot be included in the parent's application but can apply for cancellation directly if s/he was also abused (note that several studies show that witnessing abuse of the parent causes injury to the child). Alternatively, once the parent's application is approved, children can be granted parole which will last until the child is granted lawful permanent

[41] *See supra* note 39.

[42] Although the regulations contain a requirement for a psychological evaluation for applications based on emotional cruelty, that requirement was eliminated and is *not* required by USCIS.

residency through another process (for example, the parent can file a family-based petition for the child).

T Visa: The Trafficking Victims Protection Act (TVPA) of 2000[43] provided an avenue for lawful immigration status for trafficking victims. Applicants must prove that they are:

1. A victim of a severe form of trafficking in persons;[44]
2. Physically present in the U.S. on account of the trafficking;
3. Cooperating or have cooperated—or made reasonable efforts to cooperate—with law enforcement in the investigation of the trafficking; and
4. Likely to suffer extreme hardship if removed.

The T visa provides legal immigration status for four years, work authorization, and the opportunity to apply for lawful permanent residence. Certain close family members also can be included in the application as derivatives.[45]

CASE STUDY

Hope came to the U.S. to be with her boyfriend, a man who had been violent toward her in their home country, but who she believed had changed.[46] When she arrived, however, the violence persisted with the added humiliation of it happening in public because they shared their living space with some of his friends. Hope's boyfriend found her a job at the upscale market where he was a manager, but he confiscated all of her earnings. He kept her passport and told her how the police in America beat immigrants when they arrest them. After two months, Hope realized things would never improve and that she had to leave him. Hope may be eligible for a T visa if she is willing to file a report against her abuser (either to local police or federal authorities).

The T visa may be superior to other immigration options for two reasons. First, T visa recipients also are eligible for a wide range of specialized social services and benefits. Second, the victim's cooperation need not be certified by law enforcement (unlike the U visa, as explained later); instead, the victim may show the ways in which she attempted to cooperate, for example, by making reports to different law enforcement agencies about the trafficking. Minors are not subject to the cooperation requirement to get a visa, but may need to at the adjustment of status stage. For more information about filing T visas for minors, refer to the list of resources in Chapter 4.

This is a relatively new remedy, and many nuances of eligibility remain. Adjustment of Status regulations have recently been published, so the path to lawful permanent residence and citizenship is still being clarified for T visa holders. A report to law enforcement *is* required (except for minors), but a certification of cooperation is *not* required; secondary evidence of cooperation is acceptable. There is a filing deadline (with possible exceptions) only for cases where the victimization ended before October 2000; victimizations that

[43]TVPA, *supra* note 5.

[44]Defined as "(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) 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." 22 U.S.C. § 7102(8) (2008).

[45]Victims over the age of 21 may include their spouse and/or children on their applications. Victims under the age of 21 may include their spouse, children, parents and/or unmarried siblings. 8 U.S.C. § 1101(a)(15)(T)(ii) (2009).

[46]*See supra* note 1.

occurred or lasted after that date have no application deadline. Applicants are eligible for social services and benefits, and can include their spouse and/or child(ren) in the application. Unlike previously described remedies, minor victims can also include their parents and unmarried siblings in the T visa application.

U Visa: A U visa is a special visa for victims of certain criminal activities—including domestic violence and human trafficking—who cooperate with law enforcement in the investigation or prosecution of those crimes. The visa lasts for four years and a recipient may apply for a work permit. Certain close family members also may be included in the application.[47]

CASE STUDY

Maryam was living undocumented in the U.S. when she began a romantic relationship with a U.S. citizen who refused to marry her and became emotionally and psychologically abusive.[48] She was working but he made her put all her earnings in a joint bank account, for which he had the only ATM card, and he spent all of her money. She was frustrated by this but was raised to believe that a woman should support the man and provide whatever he needs. She felt that she needed to prove her value to him so that he would marry her. One day, he threw the telephone hard at her head when he thought she was talking to a man. Bleeding, she fled from their apartment, and a passerby called the police. The police took a report, and the abuser was arrested but never prosecuted. Maryam is eligible for a U visa on the basis of the assault, despite the fact that it was never prosecuted. She also may have a T visa option, but it is a more challenging case factually, particularly since she had friends and stayed not through force, but from hope and culturally-based beliefs that were manipulated by her abuser. Law enforcement and immigration officials do not always understand the more subtle forms of coercion that are based in cultural beliefs and practices.

Unlike all of the other immigration remedies discussed here, a U visa petitioner *must* submit a certification from law enforcement. Chapter Three addresses this requirement in more detail.

As long as the victim never refused reasonable requests for cooperation from law enforcement, there is no requirement that the case results in an investigation or prosecution; however, in practice, it is easier to get certifications where there has been, at the very least, a criminal investigation.

This is a new remedy; the regulations were recently published as of the publication of this guide, so there are many unanswered questions. Practitioners may need to devote considerable time to convincing law enforcement to set up a certification process. The victim may have any relationship to the trafficker or no relationship at all, making this the remedy of choice for domestic violence victims who were not married to their abusers; whose abusers are neither U.S. citizens nor LPRs; or where the abuse does not amount to trafficking. Unlike the T visa, the U visa does not require a showing of hardship upon removal. Approved U visa holders may be eligible to become lawful permanent residents after three years, but relevant regulations have just been published and the process is still slow and confusing. Applicants can include their spouse and/or child(ren), and

[47] As with the T visa, victims over the age of 21 may include their spouse and/or child(ren) on their applications. Victims under the age of 21 may include their parent(s), spouse, child(ren) and/or unmarried siblings under the age of 21. 8 U.S.C. § 1101(a)(15)(U)(ii) (2006).

[48] *See supra* note 1.

minor victims can also include their parents and unmarried siblings.

Asylum: Asylum may be available for someone who is "outside of his or her country of nationality who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[49]

CASE STUDY

Edith came to the U.S. on a student visa.[50] She fell in love with a fellow student from her country and moved in with him after a few months, although she knew her family would strongly disapprove. Threatening to tell her family if she left him, he started beating her when they fought. When money grew short, he forced her to work as a dancer in a topless bar where he was the bouncer. On two occasions, he acted as her pimp and forced her to have sex with the bar's customers. She finally fled and, with help from a domestic violence services agency, filed criminal charges against him. Edith may have an asylum claim based on her fear of persecution by him or her own family if she were returned to her home country. He might be deportable, if convicted, which would add to her fear. Her asylum claim might also be based on the persecution she might face for having done commercial sex work, or for living with a man outside of marriage.

A victim may have a fear of return because of several of these factors, but in cases involving domestic violence, the category "membership in a particular social group" is of great interest. "Social group" claims are typically articulated with gender or sex as the immutable core of inter-related characteristics that help to more precisely define the persecuted social group. For example, arguing in support of asylum on the basis of domestic violence persecution in the prominent case *Matter of R-A*,[51] the Department of Homeland Security itself argued:

> It would . . . be inaccurate to say that the social group is broadly defined by gender, the marital relationship, by her inability to leave the relationship or nationality. Rather, it is the space occupied by the intersection of these factors – married women in Guatemala who are unable to leave the relationship – that is the targeted characteristic.[52]

A woman who took steps to denounce her abuser might have a claim based upon her assertion (or the imputed assertion) of a political opinion in doing so. A woman may fear severe ostracism or physical harm from her family or community as the result of protesting an abusive marriage or divorcing. A woman trafficked into prostitution might likewise fear harm if forced to return. Abuse directed at your client because of her race, religion or ethnicity presents another potential ground for asylum. These grounds may all exist within the same case.

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[49] 8 U.S.C. § 1101(a)(42)(A) (2006).

[50] *See supra* note 1.

[51] *Matter of R-A*, 23 I & N Dec. 694 (BIA 2005) (interim decision).

[52] Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief, Feb. 19, 2004, at 27 ("DHS Alvarado Brief"), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (last visited May 8, 2008). The DHS Alvarado Brief constitutes an authoritative interpretation of a statute, signed by the general counsel of the agency charged with the execution of that statute, and as such, should be accorded considerable deference. After briefing, the Attorney General remanded the case to the BIA in January 2005 where it sat until Sept. 2008, when Attorney General Mukasey certified the case to himself and ordered the BIA to reconsider it without waiting for further regulations. On Dec. 4, 2008 the BIA granted a joint motion to remand the case back to the Immigration Court for the development of additional facts.

An applicant for asylum must prove that:

1. She was a victim of past persecution[53] or that she has a well-founded fear of future persecution;
2. The persecution is/was/will be committed either by the government or by persons or groups that the government is unable or unwilling to control;
3. The persecution is on account of the race, religion, nationality, political opinion, or membership in a particular social group (including family group or gender) of the applicant; and
4. The application was filed within *one year* of arriving in the United States (limited exceptions exist where a change in circumstances materially affects your client's situation, or where exceptional circumstances prevented your client from filing within one year).[54]

Victims can include a spouse and unmarried children in the application, and if granted, are eligible for a range of public benefits. Asylees are eligible to work immediately and can apply for LPR status one year after the grant of asylum. Applicants who are denied are referred to the immigration court if they have no other lawful status; if denied by the immigration court, the client will face deportation (but may be able to appeal). Asylum based on family groups or social groups defined by domestic violence or trafficking are cutting edge claims; there is little binding case law to support these claims, and that case law needs to be navigated very carefully to avoid undermining the claim. Please see Chapter 4 for additional information.

Additional Considerations: To gain legal immigration status, your client needs to be *admissible* to the U.S. The Immigration and Nationality Act defines grounds of inadmissibility, including entry without inspection, having a significant communicable illness (like HIV), misrepresenting one's intentions to an immigration official, or commission of a crime.

Fortunately, in many (but not all) cases, waivers of inadmissibility are available, or the grounds of inadmissibility may not apply to your client, for reasons related to the abuse she has suffered. If a client presents any of these issues, we recommend consulting with a more experienced practitioner.

Companion Criminal Remedies

In addition to the civil claims listed in this guide, civil attorneys should be aware of certain criminal actions which provide for civil remedies as well.

Racketeer Influenced and Corrupt Organizations (RICO) Act: RICO makes it a crime to participate in an enterprise that affects interstate commerce and involves a pattern of racketeering.[55] Some prostitution and sex trafficking networks are, therefore, being prosecuted under the RICO statute. RICO includes civil remedy provisions under 18 USC § 1694, which allow for an injured party to seek threefold damages suffered as a result of the RICO violation, as well as costs including reasonable attorney fees. The statute specifically addresses injuries to business or property.

Civil or Criminal Forfeiture: Defendants may be subject to civil or criminal forfeiture of any property used or intended to be used to commit or promote

[53] Persecution is "harm or suffering inflicted upon an individual to punish that individual for possessing a belief or characteristic that the entity inflicting the harm or suffering seeks to overcome." It may be "broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs. . . . [such as] requiring a person to renounce his or her religious beliefs." *Matter of Kasinga*, 21 I & N Dec. 357, 365 (BIA 1996).

[54] Children are no longer subject to the one-year filing deadline. William Wilberforce Trafficking Victims Protection Reauthorization Act § 235 8 U.S.C. 1158(a)(2)(E). 2008.

[55] 18 U.S.C. § 1962 (2007).

commission of any offense. Forfeiture may include loss of property or businesses used as fronts for trafficking enterprises, or any property traceable to gross profits or other proceeds. The Mann Act also allows victims of sexual abuse, sexual exploitation, and Mann Act violations to recover actual damages and the cost of any lawsuit (including reasonable attorney fees).[56]

State criminal statues may include forfeiture provisions as well, and will often specify how the assets acquired may be used. In some circumstances, forfeiture funds may be available to your client.

Restitution as Part of Sentencing: A federal court can order restitution for a victim of trafficking, slavery or peonage as part of criminal sentencing. When a defendant is convicted of a trafficking crime, the court is required to order restitution for the victim.[57] When a defendant is convicted of a non-trafficking crime that includes a scheme, conspiracy, or a pattern of criminal activity, a federal court can, and in certain situations, must, order restitution.[58]

Restitution to victims of trafficking is often part of sentencing in state as well as federal court. For example, under the New Jersey human trafficking statute, victim restitution can be ordered for the greater of the gross income or value of the victim's labor or services.[59]

When there is a criminal case, it is important to develop and maintain regular contact and interaction with the criminal prosecutor (and crime victim compensation and services personnel) in your client's case. Prosecutors can recommend that a defendant's sentence include, for example, payment of a victim's medical or counseling expenses.

Victim Assistance Services: Your client may also be able to access victim-assistance services available through the criminal or civil court or an outside agency. Often, such services include access to a victim compensation fund. Check whether your jurisdiction has explicitly, or in practice, added human trafficking to the list of offenses that entitle victims to compensation. For example, Iowa includes trafficking in its victim compensation provisions.[60]

Litigation Practice Pointers

Reducing Trauma: Some practices to reduce re-victimization and trauma during the litigation process include:

- ➤ Avoid unnecessary interviews by various professionals involved in the criminal and civil cases involving your client;
- ➤ Evaluate your client's ability to testify in front of the defendant and court;
- ➤ Discuss your client's rights as a crime victim;
- ➤ Help your client prepare a victim impact statement for use during sentencing;
- ➤ Consider motions for protective orders that may prevent improper questioning or bullying of your client as a witness; and
- ➤ Collaborate with a mental health provider or other support person to ensure support after difficult experiences.

Bring Both State and Federal Claims: Since FLSA establishes only minimum standards for states, an employee may be able to benefit from additional protections provided under state law. Thus, it is

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[56]Pub. L. No. 105-314, § 605, 112 Stat. 2974 (1998).

[57]18 U.S.C. § 1593 (2008).

[58]*See* 18 U.S.C. § 3663 *and* § 3663A (2008) (ordering mandatory restitution for victims of certain crimes, such as violence and consumer tampering).

[59]N.J. Stat. Ann. § 2C:13-8 (2005).

[60]Iowa Code Ann. §§ 915.80 - 915.94 (2008).

important to allege violations of both FLSA and more expansive state laws if they apply to maximize remedies. Similarly, every state in the U.S. has its own anti-discrimination in employment laws, as to many local jurisdictions. It is important to become familiar with these state laws which often provide increased protections, and also have different statutes of limitations and administrative filing requirements.

Immigration Status: Courts in many states are reaching the conclusion that immigration status (past or present) is irrelevant to discrimination, wage and contract claims. The case law on this point is clear.[61] However, your client may feel much more confident going into the process if you already have been able to help her secure legal immigration status (even if it is temporary) in the U.S. If it seems possible to at least file for immigration relief before any statutes of limitation expire, then perhaps that would help your client. Simultaneously, you can reassure the client that you will fight to keep her past and present immigration status out of the proceedings, from discovery through trial. Excellent sample briefs arguing in support of protective orders on the question of immigration status are available from organizations that have confronted this issue, should it arise in your case. Refer to Chapter 4 for more information.

Concurrent Criminal Case: The existence of a criminal case may require that your civil action be stayed, once filed. For example, the TVPRA of 2005 specifically states that a civil matter based on similar facts to a criminal proceeding *shall* be stayed.[62] Other claims can be stayed or allowed at the discretion of the court. Because an admission or finding of guilt in a criminal case is admissible in a civil case, it is usually to your advantage to stay the proceedings until the criminal case is concluded. If, however, the case is moving forward slowly, and your client is in urgent need of compensation, it may be possible to proceed with at least some of her claims. Keep in close contact with the law enforcement officials working on the criminal case so that the civil case does not inadvertently disrupt their case in ways that are preventable.

Filing Multiple Claims: As noted above, most of these claims can be filed within the same lawsuit. (This is true of any claim with a private right of action.) As long as you can include in the pleadings sufficient factual allegations to withstand a motion for summary judgment, you can include the claims. Consider a broad mix to cover the different kinds of damages available to your client and to ensure that if one part of your case is weak, a claim is alleged that will play to the strengths of your case.

There may be strategic reasons, however, to include some claims but not others. For instance, you may strongly want a jury trial if you believe jurors would be sympathetic to a human trafficking case and if you are seeking punitive damages. However, if your client is an immigrant, and you fear your jury may be biased as a result, then a bench trial may be preferable. Another consideration is whether you want to litigate in state or federal court. Think about your jury pool, the reputations of the judges who might preside over the case, and the time and expense of federal litigation versus state litigation. You can include state and federal claims in one case, but if you file in state court and include a federal claim, the defendant(s) can remove the case to federal court.

Negotiations and Settlements: Prior to, or in lieu of, filing a civil claim, you may wish to enter negotiations with the trafficker to obtain compensation or other relief for your client. Negotiations can be formal or informal, but it is a good practice to initiate the negotiation in writing,

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[61] *See, e.g., E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill., 2006); *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005); *and Flores v Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002).

[62] 18 U.S.C. § 1595(b)(1) (2008).

laying out the allegations in a letter clearly marked "for negotiation purposes only" (so that the letter cannot be used to impeach your client in any related civil proceeding), and making the request for relief. The letter should advise that, as this is a legal matter that could result in a lawsuit, the trafficker may wish to consult an attorney.

Negotiations with traffickers rarely result in settlements that come close to approaching the full amount of money that your client is owed. However, they are completed more quickly, do not require face-to-face interactions between your client and her trafficker, and can be concluded in complete secrecy. These can be important considerations for clients who fear retaliation from their family, community or the trafficker.

If you do reach an agreement with the trafficker, get that agreement in writing. We advise never putting a confidentiality clause into the agreement, unless the negotiation falls apart without it. If the other party insists upon such a clause, it should be carefully limited so that the client is able to talk to her loved ones, therapist or other support persons about what happened to her without fear of being sued for breach of contract. Sometimes it is possible to limit the clause to not disclosing the amount of the settlement.

Tax considerations are important to the structuring of the agreement. Generally, any money your client receives through a settlement will be taxable as income. However, if there was physical abuse in the relationship, you can try to structure the settlement agreement as compensation for that abuse; money paid to settle a physical abuse claim is not taxable as income. Finally, if the settlement primarily covers unpaid wages, then the employer is still responsible for payroll taxes and FICA.

Diplomatic Immunity: Unfortunately, when a trafficker is a diplomat, diplomatic immunity provisions may affect a client's ability to pursue certain remedies. The basic rule is that diplomats have full civil and criminal immunity under the Vienna Convention on Diplomatic Relations *if* they raise immunity as an affirmative defense. This basic rule may not apply, however, if the trafficking situation involved commercial activities, such as the diplomat running a catering business from his or her home.[63] It is also vital to realize that not everyone who calls themselves a diplomat is entitled to immunity. There are much lower levels of protection for non-diplomatic embassy staff and consular staff, for example. Inquiries can be made at the Department of State Office of Protocol to ascertain if the diplomat is immune. The only certain way to find this out is to sue the diplomat and see what proof is offered as an affirmative defense. The Department of State can request that the trafficker's home country rescind or waive immunity, but that is a very long process and unlikely to be successful in all but the most egregious cases. Significant media attention may be required to prompt the State Department to act. However, the threat of media attention or reports to the government that employs the diplomat can sometimes encourage a diplomat to agree to a settlement. These cases are difficult and require a careful analysis of the politics of the situation.

[63]Many advocates contend that hiring a domestic servant also constitutes a commercial activity. Circuits are split on this issue. A suit brought under the Vienna Convention disagreed with that view, although a suit brought under the Foreign Sovereign Immunities Act, *did* recognize domestic work as a commercial activity. *Compare Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), (holding that employing a domestic servant is not "commercial activity" under the Vienna Convention) *with Park v. Shin*, (holding that a domestic servant falls within the commercial activities exception) 313 F.3d 1138 (9th Cir. 2002). The arguments for the commercial activities exception to apply are arguably weaker in the context of an intersections case where there is not likely to be any formal hiring process or contractual employment relationship.

CHAPTER THREE
Practice Pointers for Effective Representation

Comprehensive Client Care

Human trafficking cases can be very complex, with multiple legal remedies and social services available. Similar to domestic violence victims, trafficking victims benefit from a holistic approach that identifies and addresses all of their needs. Trafficking victims may have just recently escaped and have no safe place to stay, or may already have built a new life. New clients should be screened for their complete legal and social needs. Ideally, an attorney will have a close partnership with a social service agency and in some cases, an in-house case manager that can provide case management services. Domestic violence attorneys may need to expand their list of potential partners to comprehensively serve trafficking victims.

It is critical that all of the providers working with a specific trafficking victim communicate often about their roles and any common challenges. Defense attorneys for the traffickers may contact the immigration attorney or other providers seeking information. It is important to inform all who are assisting the victim of such tactics so that they are ready to respond appropriately. It is important for all to know who the client's representative or advocate is for purposes of any criminal prosecution, and what exactly that person's role is. This is likely to be either the attorney filing any civil claims for back wages or damages or the immigration attorney. For trafficked immigrants, it is critical that the immigration attorney be involved in any communication with law enforcement since most trafficking-related immigration remedies require, or are greatly supported by, reports from law enforcement. Clients will be bewildered by the various government agencies involved and legal cases contemplated. Social service providers need to have enough context to respond to the client's concerns and assist in clarifying the process.

Safety Planning: As with domestic violence clients, the first step with trafficking clients is to develop a safety plan. The process is very similar for both client groups, but trafficking victims may have some additional issues to consider. Traffickers may be part of a larger network, even an organized crime ring. If so, safety issues may be more urgent and may require relocating the client to another city or state. The involvement of law enforcement may be necessary to adequately protect both the victim and the provider. Trafficking victims may need to avoid the trafficker's or victim's ethnic group (which may be the same or different) or certain parts of town that are well-known to the trafficker. Always ask the client if she has a cell phone or bank account or other documents that might be traceable by the trafficker. Finally, be sure to conduct safety planning for your own agency and other providers working with the client. Address the safety of personnel, property, and data.

Housing: Domestic violence shelters may or may not have received training on human trafficking. They have probably encountered intersection cases before, but may not be aware of it. Many shelters have requirements and rules that may not be appropriate for trafficking victims. Particular attention should be paid to policies that restrict

privacy (required participation in group therapy or other disclosures) or relate to employment. Trafficking victims may be witnesses for a federal or state criminal prosecution of the traffickers, and discussing the case in a group setting could cause problems with the case. Additionally, trafficking victims may have experienced very different forms of abuse which would not be easily understood by other members of the group. Trafficking victims may have debt that led, in part, to their vulnerability to the trafficker. They may be completely focused on working to repay that debt. Policies that restrict their ability to work and repay their debt (curfews, mandatory meeting times, mandatory classes, mandatory savings plans) may not be appropriate and may put them in danger. Alternatively, trafficked immigrants may not be permitted to work immediately. As with battered immigrant women, trafficked immigrants may have to prepare and submit a thorough application and wait for approval before being issued employment authorization (commonly referred to as a "work permit"). This may take months or years. Emergency, temporary, and transitional housing programs which require proof of legal status or legal employment could be problematic.

Medical Care: Trafficking victims generally receive little to no medical care during their enslavement. They may have been exposed to dangerous chemicals or viruses, or they may suffer from long-term conditions like heart disease that have gone untreated. A trafficking victim should be taken for a thorough medical exam as soon as possible. The client should be asked about prior illnesses, pains, or problems that were not treated (or not thoroughly treated) before and during her victimization, including dental problems.

Mental Health Care: All trafficking victims should be offered mental health care. Depending on the client's background and experience, she may not be comfortable with American mental health care. Clients should not be forced to attend counseling sessions, but the advocate may need to think carefully about how to explain and introduce the option. Terms like "counseling" and "therapy" may not be understood or accepted by some clients. Instead, it may be helpful to offer to introduce the client to someone who is a "very good listener." It might also be important to emphasize that this person (if your state provides a mental health provider privilege) will be able to keep everything a secret and that the case manager cannot (if your state does not have a trafficking advocate privilege). Privilege is an important issue to consider when selecting a mental health provider for trafficking clients. Because a federal and/or state prosecution is possible, it is important that the client discusses the details of the trafficking experience only within the context of a privileged relationship. Thus, a case manager with no privilege should not discuss the trafficking experience with the client.

Education: Trafficking victims may have limited previous education. Identifying appropriate educational resources will empower the victim and help her to find new employment opportunities after completing her studies. Trafficked immigrants may not be immediately eligible for financial aid but may become eligible once they secure immigration status (grants of asylum, T visas and continued presence all lead to eligibility for federally-funded financial aid). All minors should be accepted, regardless of their immigration status, by publicly funded schools up to grade 12. Trafficked immigrants may also benefit from English classes. All trafficking victims are likely to benefit from basic job skills or computer skills classes.

Employment: Most trafficking victims are eager to work. Working without authorization is not legal, and if the workplace is raided by Immigration and Customs Enforcement (ICE), the client could be detained and put into deportation proceedings. It is important that all undocumented clients are provided with multiple copies of their lawyer's business card and a letter stating that the client is

a trafficking victim pursuing a T visa (or whatever immigration remedy is being sought) to be presented to ICE or other law enforcement agents if detained. This will generally reduce the chance of a client being transported to a distant facility or immediately removed (deported).

Access to Benefits: Trafficking victims often have difficulty accessing the benefits that they need. U.S. citizens and lawful permanent residents (LPRs) face challenges proving their eligibility if the trafficker confiscated their documents. This is compounded by challenges faced by some trafficking victims who have been enslaved for so long that they do not know their birth names or ages. Once identity documents are obtained, victims will find that the services often are limited, and the waiting lines are long. Clients may benefit from food stamps, subsidized housing, and free medical care for the uninsured. Cash benefits are rare and generally reserved for mothers with young children, the elderly, and individuals with disabilities.

Trafficked, undocumented immigrants generally are not immediately eligible for any federally-funded public benefits. They must first obtain recognition as a trafficking victim from the Office of Refugee Resettlement within the Department of Health and Human Services (HHS). In order to obtain such recognition, a victim can file for a T visa, or be granted continued presence. For further information, please consult the resources listed in Chapter 4.

Working with Law Enforcement

Domestic violence attorneys may have some experience in working with law enforcement, but most legal remedies traditionally pursued by domestic violence attorneys do not require any on-going interaction with law enforcement. Trafficking cases, however, are different. Law enforcement is much more present, either because the victim needs assistance from law enforcement in order to access benefits or legal remedies or because the client has been charged with a criminal incident related to the trafficking. Attorneys working with trafficking victims need to be prepared for this increased interaction with law enforcement and be prepared to act strategically. The key roles of the attorney in a trafficking case, however, are the same as in a domestic violence case: closely follow any criminal cases, facilitate communication between law enforcement and the client, and advocate for your client's interests at all times. There are, however, a few key differences.

First, the stakes may be higher in trafficking cases. Domestic violence is a matter of state and local law, and can often be minimized by law enforcement. Prosecutions are few and the penalties handed down in the rare convictions are, in all but the most horrific cases, comparatively light. Human trafficking, on the other hand, is a federal crime. It has been highlighted as a human rights focus of the U.S. government. Significant resources have been dedicated to identifying and prosecuting traffickers. The penalties are steep. Under the TVPA, traffickers can be sentenced to 20 years to life for trafficking crimes. Additionally, many states are implementing trafficking laws that include a state crime of trafficking.

Second, both the T and U visas *require* your client to engage with the criminal justice system. The familiar immigration remedies for domestic violence victims (VAWA self-petition and cancellation, battered spouse waiver, and asylum) are certainly strengthened by corroboration from law enforcement, but do not require it.

Third, there may be additional safety concerns in a trafficking case. The trafficker(s) may be part of a criminal network or may simply have powerful connections in your client's community or home country. Both of these scenarios greatly raise the risk of retaliation against your client and her family members, as well as any advocates and attorneys working with her. The client, and even members of her family, may be eligible for asylum simply

because of the fear of retaliation. Every effort, therefore, needs to be made to protect your client during the investigation and the prosecution. It is also wise to conduct safety planning for your office.

Note, however, that involvement with law enforcement may *not* be necessary. Trafficking victims may be able to achieve all of their objectives with the traditional civil remedies available to domestic violence victims. Clients may be uninterested in the criminal justice system, wanting only to get away safely and to move on. Generally, U.S. citizens have that option. Trafficked immigrants, however, often must work with law enforcement in order to secure immigration remedies, reunite with family, and access social services. Clients should carefully consider their priorities and understand the pros and cons of all available resources and remedies before deciding to contact law enforcement.

Timing: If your client has not yet reported the crime to law enforcement, there are some benefits to taking time before making the initial approach. In particular, a traumatized client may be receiving counseling that will help her tell her story to you and later to law enforcement in a more effective, coherent way. Some clients are not able to discuss the trafficking situation for several months regardless of the benefits available. Time also allows you to develop a more nuanced understanding of your client's situation; the average trafficking case takes two or three multi-hour interviews before even the broad parameters of the story are known and settled. It may take even longer if you are using an interpreter to communicate with your client.

With the T visa particularly, although your client may be eager to secure immigration relief due to safety and other concerns, it ultimately will benefit the client to develop the case thoughtfully and accurately to avoid inconsistencies and errors that could prolong adjudication of her application down the road. There is no deadline for filing a T visa application.[64]

With the U visa, however, there may be significantly more risks associated with delayed reporting. Although there is no statute of limitations, the requirement that law enforcement certify the victim's cooperation means that in practical terms, reports must be made in such a timeframe that law enforcement is likely to actually investigate or at least document the crime. As domestic violence attorneys already know, the likelihood of domestic violence charges being investigated, let alone prosecuted, diminishes with each passing day. There are also specific criminal statutes of limitation affecting law enforcement's ability to prosecute. Therefore, if the U visa is your client's best route to immigration status, you may not have the luxury of working with a therapist for a significant period of time to help the client tell her story in the most effective way. The practicalities of launching an investigation may demand a much quicker response.

This time also should be used to investigate to which law enforcement agency the report could be made.[65] Some agencies, offices, and individuals are more likely to investigate trafficking cases. Some are known to be more victim-centered in their approach. Contact local or national trafficking advocates to research your options. Determine the client's priorities. Does the client want to see a prosecution go forward, or is she just willing to do whatever is necessary to bring her children to

[64] A one year filing deadline exists for trafficking cases which occurred before the passage of the TVPA, with limited exceptions. However, the deadline was not in the statute and the regulations are thus arguably *ultra vires*. Alternatively, advocates can argue the trafficking continued past the October 2000 date, e.g. threats made to family members subsequent to the victim's escape.

[65] Reports can be made to a variety of agencies including: Department of Justice, Criminal Section, Civil Rights Division; Federal Bureau of Investigation; Department of Homeland Security, Immigration and Customs Enforcement; Department of Labor; the local U.S. Attorney; and state and local law enforcement.

the U.S.? If the former, find the agent who is most interested and experienced in trafficking cases.

There are good faith ways to make the report while assuring your client that law enforcement will display sensitivity in handling the report. For example, the Department of Justice Trafficking in Persons Hotline will keep the client's identity protected during the phases of an investigation prior to determining whether they will bring a criminal case forward or not. Many local law enforcement agencies have been well-trained on these issues and can be valuable allies in supporting victims during a trafficking investigation. See Chapter 4 for additional information.

Finally, you should work to control the timing of the various interviews and other related appointments. In some cases, clients benefit from scheduling an appointment with their therapist or other support person immediately after a law enforcement interview. Communication among all providers working with a client is especially important during an active law enforcement investigation, when a client is likely to be re-traumatized to some degree.

The Trafficking Victim as Victim-Witness: In the criminal case, your client transforms—often unfortunately so—from "client" who has agency over her case to "witness" who has little control over the process. The civil lawyer's role in this process is to advocate for the client's interests, to help the client maintain some agency during the process, and to help the client make sense of the often bewildering process (particularly for traumatized clients).

Specifically, the lawyer can be an invaluable advocate helping to communicate the client's interests to law enforcement. Does your client have fears about making the abuser deportable? Does she fear retaliation against herself or her family? Will your client be devastated if the abuser is allowed to serve merely a few hours of community service in return for a guilty plea? Being able to help law enforcement understand the client's goals may help to obtain a better outcome for your client.

In interviews with law enforcement, your presence also may be reassuring to the client. Although the interviewer will prefer fewer interruptions, you may be able to help clarify where you see a misunderstanding, or ask for a break to speak with your client when you sense she is unable to talk about the most traumatic aspects of her case. You may need to ask for more time (weeks) to allow your client to start processing the trauma with a therapist. Your understanding of the case and your relationship with the client are a tremendous asset to the law enforcement investigation, so you must not be shy about embracing this role.

Your role is also to advocate for law enforcement to understand the case in its entirety. As noted above, a prosecutor experienced in domestic violence cases may not be on the lookout for signs of human trafficking. You can argue the case to him or her so that the investigation covers what is important to your client.

You also may need to ensure that your client's rights, as a victim, are being protected. The U.S. Department of Justice's *Attorney General Guidelines for Victim and Witness Assistance* outlines crime victim rights fairly clearly.[66] Notably, the client is entitled to notification about the status of the case, assistance in accessing services and protection from the perpetrator. The client also has the right to attend the trial or to prepare a victim impact statement. The client will likely benefit from assistance in preparing a victim impact statement, which can affect sentencing.

[66]U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime; *Attorney General Guidelines for Victim and Witness Assistance* (2005), *available at* http://www.usdoj.gov/olp/final.pdf.

Finally, where your client is pursuing a T or U visa, your role is certainly to advocate for law enforcement to certify your client's cooperation. For the T visa, the lawyer can document the client's efforts to cooperate if law enforcement is unwilling to provide an official certification. Some law enforcement agencies have excellent systems in place to certify. Many others will require education about the certification purpose and process, and will need follow-up from you to get the certification done. For the latter, drafting the form itself, and/or talking with local service providers, the victim advocate, prosecutor, detective, or responding officer may help.

Standards for Cooperation: Ongoing Cooperation, Reasonable Requests: When considering whether or not to certify your client, law enforcement can consider whether your client has cooperated on an ongoing basis. A client who files a police report but then refuses to speak with a detective is unlikely to be certified. Likewise, a client who refuses to testify may, possibly, be deemed to have stopped cooperating. If an official certifies your client, and at a later date the client stops cooperating, the official has the ability to revoke the certification, so the "ongoing" character of the cooperation is very important.

This requirement is tempered, however, by the requirement that a law enforcement request be *reasonable*. Clearly a request that puts the client or her family in danger, or a request for testimony in another state without any provision for transporting the client, could be unreasonable. The context matters greatly, and the lawyer must ensure that the client continues to be seen in the best possible light, explaining why a specific request is not possible while seeking ways to continue to be helpful generally. Specifically, the client's physical and mental state should be considered. Where a client has suffered psychological trauma, and interaction with law enforcement is interfering with her recovery, even an interview request may be seen as unreasonable.

When Law Enforcement Resists Identifying a Crime as Trafficking: Intersection cases are opportunities to bring many criminal statutes to bear in the effort to hold traffickers accountable. However, too frequently, law enforcement sees these cases as "either/or." Prosecutors who specialize in domestic violence may have only a cursory understanding of human trafficking, and of the breadth of the related federal criminal statute. Sadly, law enforcement agents also may be unwilling to "turn over" a case to another agency for prosecution and may choose to sit on it instead; or it may be determined that jurisdiction rests with the agency that is least interested in pursuing trafficking cases (especially intersection cases which are particularly hard to prosecute). This pigeon-holing and turf mentality precludes the fullest possible prosecution of the case.

It is entirely appropriate for you to encourage law enforcement to think about all the crimes embedded in an intersection case, emphasizing that the more charges that can be filed, the greater the leverage the prosecutor has during any plea negotiations.

The Trafficking Victim as Defendant: Some trafficking victims are discovered only after they have been charged with a crime. Generally the crime is related to the trafficking. Domestic violence attorneys may have experienced this with clients who, for example, turned to theft to feed themselves and their children. Trafficking victims may have been forced into theft, prostitution, drugs, fraud or any number of crimes. It is crucial that the attorney defending the client in the criminal case be made aware of the circumstances surrounding the criminal acts. It might be beneficial to report the trafficking crime quickly to an experienced and victim-centered law enforcement agency. The agent investigating the trafficking also should contact the prosecutor's office to possibly convince the prosecutor to reduce or drop the charges.

This conflict is often seen with sex trafficking victims who are arrested on prostitution-related charges. Increasingly, local law enforcement agencies are screening for trafficking victims, but not all do. For all trafficking victims, the arrest makes it more difficult to find appropriate services and support, and further erodes their self-confidence and belief in the system. The trafficker has likely been telling the victim that no one will believe her, that she is a bad person and will be arrested and (if applicable) deported if she calls the police or tries to escape. This arrest has reinforced these threats. In any case, additional psychological support will likely be necessary. Individuals seeking immigration relief will have to disclose and explain this criminal history in the context of their immigration application, although a waiver will likely be available.[67]

Working with Media: Opportunities and Cautions

Human trafficking is an atrocious crime, and as such, has generated vast media interest. Organizations known to focus on human trafficking are often inundated with requests to interview "victims," requests to go on rescue operations, and so forth. As with any kind of legal representation, media can be strategically useful, but only after careful analysis with the client about the risks and benefits.

The risks of working with media include direct retaliation to the client and/or her loved ones by the trafficker. This is especially true in the internet age when even a local media outlet's story will be commented upon, blogged about and emailed instantaneously around the world. The dangers also may include condemnation in the home country for bringing shame to a fellow national (where the trafficker is from the same country), or harassment of the client if she wins large money judgments in court, regardless of whether she ever collects money on those judgments. A client may also be re-traumatized by the telling or viewing of her story.

Apart from personal risks to your client, a separate but significant risk is the loss of control over the story; once an interview has been done, your client usually has little to no control over the editing process. Comments may be taken out of context, or key facts confused, which could then complicate ongoing civil, criminal or immigration cases. Finally, prosecutors understandably shy away from media during an investigation or prosecution for fear that the victim will make inconsistent statements that can then be used to attack credibility during a trial.

On the other hand, the benefits to engaging with the media can be considerable, depending on the circumstances. First, working with the media may help the victim to have more agency in holding her abusers accountable by publicly shaming them. Media exposure can also bring pressure to settle ongoing litigation or pressure traffickers to honor court judgments. In the specific case of traffickers who are diplomats with diplomatic immunity, media pressure (or the threat of it) may be the *only* way to start a negotiation process. Finally, many victims voice a hope that by telling their story, they can shed light on a terrible crime and prevent the victimization of others. This can also be therapeutic. In any case, it is likely that positive, responsible media coverage will generate interest in the case in ways that make an investigation by law enforcement and/or an immigration application even more compelling.[68]

[67] The process is not yet entirely clear as adjustment of status regulations have just been published for the T and U visas as of the writing of this guide.

[68] Any solid media coverage of a client's case could be submitted in support of an immigration application.

For some clients, no matter how great the benefits, her fear of speaking publicly about her experiences will rule out working with the media. For others, the time may not be right. For yet others, it is difficult to convince them *not* to talk to the media. There is no hard and fast rule for or against working with media, and we recommend simply helping your client think through all the options, the risks and the benefits, and documenting your advice for the client to reflect upon later. Clients should also be encouraged to consider what limitations they want to place on the media coverage (disguised face or voice, use of a false name) and have signed agreements from media outlets specifying these limitations.

CHAPTER FOUR
Resources for Attorneys & Advocates

This guide is meant to serve as a basic introduction to the variety of issues you will encounter and need to be aware of when assisting victims of human trafficking. Comprehensive resources relating to the topics outlined in this guide already exist and are constantly being updated to reflect changes in law. We hope the following information will be useful to you in locating these additional resources.

Additional Resources

Additional resources are available at www.abanet.org/domviol/tip.

Useful Organizations

There are many local and national organizations that have resources for attorneys representing human trafficking victims. Some of these organizations are:

- ASISTA: www.asistaonline.org
- Center for Gender and Refugee Studies: www.cgrs.uchastings.edu/
- Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], National Institute on State Policy on Trafficking of Women and Girls: www.centerwomenpolicy.org/programs/trafficking/default.asp
- The Freedom Network USA: www.freedomnetworkusa.org
- The Legal Aid Foundation of Los Angeles: www.lafla.org
- Humantrafficking.org: www.humantrafficking.org
- The Immigrant Legal Resource Center: www.ilrc.org
- Legal Momentum's Immigrant Women Program: www.legalmomentum.org
- The National Network to End Domestic Violence: www.nnedv.org
- The U.S. State Department Office to Monitor and Combat Trafficking in Persons: www.state.gov/g/tip
- National Employment Law Project: www.nelp.org
- National Employment Law Project's Immigrant Worker Project: www.nelp.org/iwp
- National Immigration Law Center: www.nilc.org
- Legal Aid Society, Employment Law Center: www.las-elc.org
- U.S. Committee for Refugees and Immigrants, National Children's Center Resource Library: www.refugees.org/article.aspx?id=1556&subm=75&area=Participate&ssm=118

Print Manuals

Ayuda. *Assisting Battered Immigrants and Their Children to File Immigration Claims Under the Violence Against Women Act: A Manual for Immigration and Domestic Violence Attorneys and Advocates* (5th Ed.), *available upon request at* www.ayuda.com/pages/page.cfm?id=41&pid=6&eid=11

Center for Applied Legal Studies, Georgetown University Law Center, *Asylum Case Research Guide*, *available at* www.ll.georgetown.edu/guides/CALSAsylumLawResearchGuide.cfm

Florida Coalition Against Domestic Violence, *Domestic and Sexual Violence Advocate Handbook on Human Trafficking: Collaborating to End Modern-Day Slavery* (2nd Ed.) (2004), *available at* www.fcadv.org/downloads/legal/Human%20Trafficking%20Handbook%20for%20advocates%20English.pdf

Regina Germain, Amer. Immigr. Law. Ass'n, *Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (5th Ed.) (2007).

Immigrant Legal Resource Center and the Catholic Legal Immigration Network, Inc., *The VAWA Manual: Immigration Relief for Abused Immigrants* (5th Ed.) (2008), *available for purchase at* www.cliniclegal.org/Publications/GuidesHandbooks.html

Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Trafficking* (S. Poverty Law Ctr. 3d ed.) (2008), available at http://library.lls.edu/atlast/HumanTraffickingManual_web.pdf

Eva Klain & Amanda Kloer, Amer. Bar Ass'n, *Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children's Attorneys & Advocates* (2008), *available upon request at* www.abanet.org/domviol

U.S. Conference of Catholic Bishops, Migration and Refugee Services, Catholic Legal Immigration Network and the Legal Aid Foundation of Los Angeles, *A Guide for Legal Advocates Providing Services to Victims of Human Trafficking* (Nov. 2004), *available at* www.cliniclegal.org/Publications/Freepublications/HumanTrafficking.pdf

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COMMENTS

CIVIL LITIGATION ON BEHALF OF VICTIMS *of* HUMAN TRAFFICKING

Written by

DANIEL WERNER
Deputy Director
IMMIGRANT JUSTICE PROJECT
SOUTHERN POVERTY LAW CENTER

KATHLEEN KIM
Associate Professor of Law
LOYOLA LAW SCHOOL LOS ANGELES

CIVIL LITIGATION ON BEHALF OF VICTIMS
OF HUMAN TRAFFICKING

Third Edition

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a project of the Southern Poverty Law Center

DISCLAIMER

This manual is intended to introduce attorneys representing trafficked clients to the basic litigation tools for trafficking civil cases. However, the legal theories discussed here do not address distinctions among jurisdictions, and the content of this manual is by no means exhaustive of the laws and litigation strategies available to trafficked persons. For these reasons, this manual is not to serve as a replacement for independent research of legal claims and strategy tailored to the circumstances of a particular case.

Non-attorneys or attorneys who are not civil litigators may also benefit from this manual by familiarizing themselves with their client's options for civil relief. All those providing services to trafficked persons can inform their client that they have options for civil relief and assist their client in finding a competent attorney. However, the unauthorized rendering of legal advice, including the interpretation of these materials for a trafficking victim by individuals not licensed to practice law, should not occur under any circumstances. A civil attorney, preferably one who has previous experience with civil litigation on behalf of immigrant victims of exploitation, is in the best position to provide sound legal advice.

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PREFACE

Over the past years, economic and political conditions abroad and in the United States have caused modern-day slavery — commonly referred to as human trafficking — to thrive. From the shipyards of Mississippi to the post-Katrina reconstruction to domestic work in the Washington, D.C. suburbs to farmworkers in Colorado to massage parlors in San Francisco, trafficked people toil under unimaginably cruel conditions.

Escape means risking the security of their families and their families' homes, their immigration status, and even their lives. Still, some modern-day slaves do find the path to freedom. It is for those people — and for the men, women, and children who remain captive — that this manual is written.

Civil litigation gives power to the powerless and is a critical tool to correct deep and pervasive wrongs. This is why the Southern Poverty Law Center is bringing litigation on behalf of human trafficking survivors and encouraging other attorneys to do so as well.

We recognize that this manual will not answer all of your questions. Some of the laws protecting human trafficking survivors are new, while others are infrequently used. Therefore, the human trafficking civil litigation slate is only intermittently marked.

We hope this manual gives civil attorneys guidance as they develop the law in a way that can lead more modern-day slaves to freedom and empowerment. Nearly 145 years after the Thirteenth Amendment became part of our Constitution and abolished legal slavery, we will work to finally put an end to involuntary servitude in the United States.

Morris Dees
Southern Poverty Law Center
October 2008

CHAPTER 1
LOGISTICAL CONCERNS

I. THE "PROS" AND "CONS" OF CIVIL LITIGATION

Attorneys representing victims of trafficking have a responsibility to discuss civil litigation with their clients, and to weigh the "pros" and "cons" of a lawsuit. Absent an effort from the criminal prosecutors to seek restitution from the traffickers, litigation may provide the only means by which victims of trafficking may be "made whole," and litigation can provide forms of relief that may not be available through a restitution order. Litigation also discourages would-be-traffickers and employers hiring trafficked persons from engaging in these practices. Finally, and perhaps most importantly, civil litigation is often the only mechanism that allows a victim of human trafficking to confront the trafficker. This process can be important in the healing and empowerment of the victim.

When considering whether to file litigation on behalf of trafficking victims, attorneys and clients should consider the following factors:

- Are there potential defendants who have the resources to satisfy a judgment?
- Is your client available for discovery?
- Are the potential defendants located in the United States?
- Is your client willing to endure years of litigation?
- Are there safety concerns for your client and his or her family?
- Are there other potential plaintiffs?
- How will civil litigation impact the criminal case?
- Do you have the stamina and resources to prosecute the civil case? If not, are there firms that may be willing to co-counsel?
- Will civil litigation have any impact on your client's immigration status?
- Will the criminal prosecutors seek restitution on behalf of your client and others, and if so, what form will the restitution take?
- Are there diplomatic immunity issues?

II. FINDING HELP FROM, AND CO-COUNSELING WITH, OTHER ATTORNEYS

Attorneys considering litigation on behalf of trafficking victims are encouraged to seek the assistance of other attorneys who have experience in this area. As a first step, consult the Anti-Trafficking Litigation and Assistance Support Team ("ATLAST"), a technical assistance project launched by the authors of this manual, at http://library.lls.edu/atlast/. The ATLAST website provides access to litigation resources, advice and referrals. Please contact the authors of this manual for more information.

Attorneys with limited resources should also consider seeking *pro bono* assistance from law firms. A good place to start is the website for the ABA Standing Committee on *pro bono* and public service: www.abanet.org/legalservices/probono/home.html. The ABA has also recently created a pilot program that will specifically link *pro bono* attorneys with human trafficking cases. For more information, visit www.abanet.org/domviol/tip/. Another good resource both for volunteering *pro bono* services and for finding a pro bono attorney is www.probono.net.

III. WORKING WITH A PARALLEL CRIMINAL PROSECUTION

A. Criminal Restitution

Under the Mandatory Victim Restitution Act of 1996,[1] restitution is now mandatory in many cases. The Victims of Trafficking and Violence Protection Act of 2000 ("TVPA") enacted 18 U.S.C.S. § 1593, which provides that the court shall order convicted criminals to pay mandatory restitution "in the full amount of the victim's losses."[2] Therefore, restitution must be addressed in plea negotiations and in the court's sentencing colloquy. A criminal sentence that includes restitution may also be recorded by the victim and enforced as any other judgment. Thus, if prosecutors are aggressive about restitution, a criminal defendant pleads guilty or is convicted, and the court orders restitution, there may be no need to take the time and expense of engaging in civil litigation. On the downside, if restitution is not part of plea discussions, and the court fails to inform a criminal defendant upon accepting a sentence that restitution will be an element, then the court may not be able to impose restitution. Since prosecutors and criminal defendants are mostly focused on jail time, restitution can be forgotten to the detriment of the victim. Further, even where restitution is ordered, it frequently falls far short of what the victim could receive through civil litigation. As discussed later in this manual, significant other forms of relief may be available through a civil lawsuit that are not contemplated in a restitution order, including pain and suffering, punitive, statutory, liquidated, and treble damages. The prospect of a large attorneys' fees award stemming from civil litigation may also have a significant deterrent effect on the trafficker. Finally, the prosecutors can only seek restitution against the criminal defendant. Joint employers or tortfeasors bear none of the burden of a restitution order.

Background

Restitution is money paid by a criminal defendant as a fine or as compensation to a victim for losses resulting from the crime. Restitution does not serve as an independent civil cause of action. However, if traffickers are successfully convicted, restitution may provide a significant source of monetary recovery for the trafficking victims.

Criminal restitution, distinct from civil damages, has reached the millions of dollars in a number of cases.

- *U.S. v. Lakireddy B. Reddy*:[3] Defendant ordered to pay $2 million to four victims trafficked for restaurant work and sexual exploitation.
- *U.S. v. Kil Soo Lee*:[4] Defendant ordered to pay $1.8 million in restitution to hundreds of Vietnamese and Chinese workers in American Samoa, in addition to a 40 year prison sentence.
- *U.S. v. Cadena*:[5] Perpetrators of a trafficking ring in Florida were forced to pay $1 million in restitution to its victims.

Because restitution is not an independent civil cause of action, only the prosecutor of the criminal trafficking case may request it from the court. Thus, a lawyer or advocate representing the interests of a trafficked client should encourage prosecutors to request and pursue restitution. This may involve working with prosecutors to calculate the victim's losses in a manner that achieves the greatest monetary compensation for the victim.

Making the Claim

In the event of a successful criminal prosecution of a trafficking case, the victims are entitled to mandatory restitution from their traffickers. A complete restitution order can compensate trafficking victims, for all

1 18 U.S.C. §§ 3613(a), 3663(a) (2008).
2 18 U.S.C. § 1593(b)(1).
3 Case No. 4:00-cr-40028-CW-1 (N.D. Cal. 2000).
4 Case No. 1:01-cr-00132-SOM-BMK-1 (D. Haw. 2001).
5 Case No. 98-14015-CR-RYSKAMP (S.D. Fla. 1998).

actual economic losses he or she has suffered. This generally includes lost income pursuant to 18 U.S.C. § 1593(b)(3) as well as any out of pocket losses flowing as a direct result of the trafficking crime codified at 18 U.S.C.S. § 2259(b)(3).

Lost Income

A victim is entitled to "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act."[6]

A human trafficking victim's lost income or lost earning potential for purposes of restitution is calculated according to the time period in which the victim was acting under the direct control of the trafficker. There are various methods used to calculate lost earnings. The most common method is based on a minimum wage analysis under the Fair Labor Standards Act ("FLSA") or an analogous state minimum wage law. For example, a victim was entitled to restitution of approximately $917,000 based on minimum wage analysis and overtime provisions spanning nearly 20 years of exploitation.[7]

Where illegal work is involved, such as prostitution, a minimum wage analysis according to state and federal labor codes cannot be applied. In this situation, the appropriate method for calculating lost income is to determine the amount of the convicted trafficker's gross income from the trafficking victim's services. For example, when a criminal organization forced women into prostitution, the court ordered the victims restitution in the amount of $1 million based on the organization's profits.[8]

Other Economic Losses

As defined under 18 U.S.C.S. § 2259(b)(3) a victim's losses include:

A) medical services relating to physical, psychiatric, or psychological care;
B) physical and occupational therapy or rehabilitation;
C) necessary transportation, temporary housing, and child care expenses;
D) lost income;
E) attorneys' fees, as well as other costs incurred; and
F) any other losses suffered by the victim as a proximate result of the offense.

Victims have a right to compensation for any other out-of-pocket losses they suffer as a result of a crime. In calculating a victim's losses, an advocate should communicate to the victim the utmost importance in documenting all expenses incurred. Receipts or other similar documentation is the most effective means in calculating actual losses.

Of note is 18 U.S.C. § 2259(b)(3)(F), which provides a broad catch-all phrase "any other losses suffered by the victim as a proximate result of the offense," without specification of types of losses. Therefore, an advocate should work with prosecutors to define this provision as widely as possible. For example, "other losses suffered" could include future lost wages, future medical expenses, and future employment issues due to a victim's physical or psychological impairment.

Strategic Recommendations

Advocates should communicate with prosecutors to establish the appropriate means for calculating the amount of restitution. The method employed to determine the amount of restitution should provide the victim with the maximum compensation possible. In addition to relief from lost earnings, advocates can index all other economic losses suffered by the victim and ensure that the totality of the losses are known to the

6 18 U.S.C. § 1593(b)(3).
7 United States v. Calimlim, Case No. 04-CR-248, 2007 U.S. Dist. LEXIS 18933, at *3 (E.D. Wis. Feb. 14, 2007).
8 United States v. Cadena, Case No. 98-14015-CR-RYSKAMP (S.D. Fla. 1998).

prosecutors. Advocates can also assist in gathering adequate proof, receipts or affidavits corroborating the victim's losses. Finally, where there is no prosecution or where direct restitution has not been paid, advocates should consider tapping into their state's crime victim's restitution fund. At least 35 states have implemented some type of victim compensation program.[9]

Keep in mind also that restitution does not preclude an award of civil damages arising out of the same events.[10]

B. How a Criminal Conviction of the Traffickers May Help the Civil Case

Under the collateral estoppel doctrine, a guilty verdict in a criminal case may be used in a subsequent civil action to prove the facts upon which it was based.[11] Keep in mind, however, that the guilty verdict only has a collateral estoppel effect on the guilty party and those who were his or her privies at the time of the criminal proceeding.[12] Therefore, it may be difficult to argue that a guilty verdict of a trafficker has a preclusive effect on a joint employer or joint tortfeasor in the parallel civil litigation.

C. Immigration-Related Benefits of Client's Participation in the Criminal Prosecution or the Civil Litigation

The TVPA provides that:

> [F]ederal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible ...[13]

As a result of this provision, trafficking victims who are available to be witnesses in a criminal prosecution often receive continued presence *and* employment authorization. Furthermore, in order to be eligible for a "T" visa, an immigrant who is 18 years of age or older must comply with "any reasonable request for assistance in the ... investigation or prosecution of acts of trafficking" and show that he or she "would suffer extreme hardship involving unusual and severe harm upon removal."[14] Similar requirements apply for the "S" visa,[15] and the "U" visa.[16]

The U.S. Department of Justice ("USDOJ") has recently taken the position that human trafficking victims must be issued Notices to Appear, thereby placing the victims in removal proceedings, before an interview with U.S. Immigration and Customs Enforcement ("ICE") related to the trafficking claims can occur. The victim also must be fingerprinted and photographed by ICE. The Notice to Appear does not include an actual court date, and the victim is not detained. ICE waits to set the court date until the investigation or prosecution is completed. This policy has been roundly condemned by advocates for survivors of human trafficking,

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9 For a survey of these programs, *see* D. Parent, B. Auerbach, & K. Carlson, *Compensating Crime Victims: A Summary of Policies and Practices* (National Institute of Justice 1992).

10 *See* TVPA, 18 U.S.C. § 1593 ("Notwithstanding section 3663 or 3663A, and *in addition to any other civil or criminal penalties authorized by law*, the court shall order restitution for any offense under this chapter (emphasis added)."); *see also* Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987) (because there was no litigation of the amount of restitution awarded in the criminal action, it did not have a collateral estoppel effect on the subsequent civil action); *cf.* U.S. v. Barnette, 10 F.3d 1553, 1556 (11th Cir. 1994) ("an order of restitution is not a judicial determination of damages.").

11 For a good review of case law on this subject, *see In re* Towers Financial Corp. Noteholders Litigation, 75 F. Supp. 2d 178, 181 (S.D.N.Y. 1999).

12 *See, e.g.,* Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 184 (2d Cir. 2003); Pactiv Corp. v. Dow Chem. Co., 449 F.3d 1227, 1233 (Fed. Cir. 2006).

13 22 U.S.C. § 7105(c)(3) (2008). The Trafficking Victims Reauthorization Act of 2003 indicated that, in considering certification of a victim of a severe form of trafficking, the U.S. Department of Health and Human Services "shall consider statements from State and local law enforcement" indicating that the individual has been cooperating with a state-level prosecution." 22 U.S.C. § 7105(b)(1)(E)(iv). Whether this translates into continued presence for trafficking victims cooperating with state prosecutions remains unclear at the time of this update.

14 *See* Immigration & Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2000). Immigrants under age 18 do not need to comply with the "reasonable assistance" requirement. *Id.* at § 1101(a)(15)(T)(i)(III)(bb).

15 *See id.* at § 1101(a)(15)(S)(i).

16 *See id.* at § 1101(a)(15)(U)(i)(III). The "U" visa regulations allow for a broad range of authorities investigating alleged criminal activity, including judges, to certify a petitioner's application. *See* 8 U.S.C. § 1184(p)(1).

including the authors of this Guide, as processing for removal is likely to cause greater trauma for the survivor, and the uncertain outcome will likely dissuade many survivors from approaching law enforcement. Still, it is now imperative that attorneys discuss with their trafficked clients the potential risks associated with this policy before presenting the clients to ICE investigators. Legal advocates should also consider presenting trafficking survivors directly to trusted FBI or local law enforcement agents with whom a relationship has been cultivated, rather than to the USDOJ Civil Rights Division, as this would make it more likely—though not certain—that ICE would remain out of the picture.

Regularization of a client's immigration status will help the client's civil case. A plaintiff's immigration status generally is not admissible in a civil proceeding.[17] However, representing undocumented immigrants can be logistically tricky. For example, it may be difficult for an undocumented immigrant to travel to depositions or court appearances.

The civil litigation itself may also provide some immigration benefits. At least one judge has certified "U" visa applications in the context of a civil action brought by trafficked workers who were facing imminent removal from the United States.[18]

D. The Prosecutors' Position Regarding the Civil Action

Staying the Civil Action until the Conclusion of the Criminal Prosecution

If the civil action is filed before the introduction of evidence in the criminal proceeding, it is very likely that the criminal prosecutors will move to intervene in the civil case for the limited purpose of staying discovery. Where there are parallel civil and criminal actions, such motions are routinely granted.[19] Alternatively, as occurred in one trafficking case, the Court may deny the government's motion to intervene, but rule *sua sponte* to stay the civil proceedings.[20] The prosecutors generally want a stay because criminal defendants should not be able to use the more permissive civil discovery process to make an end run around restrictions on criminal discovery.[21] On the other hand, the defendants themselves may support a stay rather than having to choose between claiming Fifth Amendment privilege in civil discovery, which carries a negative inference in civil proceedings, and jeopardizing their defense in the criminal proceedings by responding to discovery.[22] The government will likely also argue this position in its brief in support of the stay.

From the plaintiff's perspective, a stay may be beneficial in several respects. First, if your client is concerned about his or her safety and has thus far maintained anonymity in both the civil and the criminal action, civil discovery may jeopardize this. For example, while you may obtain a protective order prohibiting deposition questions that may endanger your client, it is immensely difficult to assure that your client is sufficiently prepared so as to avoid revealing such information. This is particularly true if your client lacks formal education and experience with legal processes.

A stay also may be helpful if the defendants are expected to claim Fifth Amendment privilege in the civil discovery. As discussed above, though the Fifth Amendment privilege carries a negative inference in civil litigation, this inference is not helpful if you are trying to learn facts to support your claim against unindicted civil defendants. The spectre of the Fifth Amendment privilege will render much of this critical initial fact-finding

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17 *See* Chapter 2, § I(C), *infra*.

18 *See* Garcia v. Audubon Communities Management, LLC, Civ. No. 08-1291 Section "C" (5), 2008 U.S. Dist. LEXIS 31221 (E.D. La. April 15, 2008) (finding that the moving plaintiffs "provided sufficient evidence to show that they 'may be helpful at some point in the future' to an investigation regarding qualifying criminal activity.") (quoting 72 Fed. Reg. 53019).

19 *See, e.g.*, United States v. Kordel, 397 U.S. 1, 12 n.27 (1970); S.E.C. v. Credit Bancorp, Ltd., 297 F.3d 127, 141 (2d Cir. 2002) (discussing the scope of previously issued stay); Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp. 1134, 1138-41 (S.D.N.Y. 1995).

20 *See,* Javier H. v. Garcia-Botello, 218 F.R.D. 72 (W.D.N.Y. 2003).

21 *See, e.g., In re* Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 253-54 (D. Md. 2004); *Javier H.*, 218 F.R.D. at 74-75; Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996).

22 *See, e.g., Javier H.,* 218 F.R.D. at 74-75; Twenty-First Century Corp. v. LaBianca, 801 F. Supp. 1007, 1011 (E.D.N.Y. 1992).

practically impossible. Additionally, even if some civil discovery has taken place, new issues of contention will undoubtedly arise in the course of the presentation of evidence in the criminal trial. This will require a second round of discovery. This process would be stilted and duplicative, and seems unnecessary in light of the ease with which the court can relieve the burden.

Further, it is likely that you will be able to use some of the positions adopted by the criminal defendants in support of your client's civil claims. The doctrine of judicial estoppel prevents a party from using one argument in one case, and then relying on a contradictory argument to prevail in another similar case.[23] Under the same doctrine, the criminal defense will try to use any sworn testimony of your client from the civil litigation to attack your client's testimony in the criminal case.

Finally, as discussed above, collateral estoppel will likely preclude a criminal defendant who was found guilty from raising certain defenses in the civil action.

The Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA") grants a civil cause of action for violations of the Act,[24] but requires that the civil action be stayed "during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[25] This provision appears to create a statutory mandate that the civil action be stayed until the trial court proceedings have concluded.[26] Still, the automatic stay only applies to "any civil action filed under this section."[27]

Since the passage of the TVPRA, only one court has issued an opinion addressing the automatic stay. In *Ara v. Khan*,[28] the U.S. District Court for the Eastern District of New York granted the United States' letter motion for a stay, which was apparently triggered by a scheduled Rule 34(a)(2) inspection of the defendants' home. Still, the court tempered its decision:

> ...Fairness requires that I make the instant order now so that the defendants have time to decide whether they still wish to permit the inspection. The parties are of course free to conduct the inspection, and to exchange information in other ways that would normally be required under the relevant discovery rules, on a purely voluntary basis and according to any mutually agreeable schedule. By granting the government's application I cannot and do not forbid such cooperation; instead I merely remove any spectre of judicial compulsion for as long as the stay remains in effect.[29]

Therefore, if you do not bring TVPRA claims, there is no automatic stay, although the prosecution may still intervene to attempt to stay your civil action.

There are two glaring downsides to a stay: first, defendants — particularly those who are not part of the criminal prosecution — will have ample time to manipulate their evidence. Therefore, you may want to request that a stay include an order requiring that the defendants preserve any documentary or other physical evidence pertaining to the action. In the securities litigation context, where stays are commonplace, courts frequently order that documents be preserved while a stay is in effect.[30]

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23 The U.S. Supreme Court most recently explained the judicial estoppel doctrine in New Hampshire v. Maine, 532 U.S. 742, 749 (2001). *See also* Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 527 (7th Cir. 1999) (stating that courts will apply judicial estoppel when "(1) the later position [is] clearly inconsistent with the earlier position; (2) the facts at issue [are] the same in both cases; and (3) the party to be estopped [has] convinced the first court to adopt its position.").

24 18 U.S.C. § 1595 (2008).

25 18 U.S.C. § 1595(b)(1) (2008).

26 The automatic stay provision applies to the entire civil action, rather than just to discovery in the civil action. *Compare* 18 U.S.C. § 1595(b)(1), *with Javier H.*, 218 F.R.D. at 75-76.

27 *See* § 1595(b)(1).

28 Case No. 07 Civ. 1251, 2007 U.S. Dist. LEXIS 43170 (E.D.N.Y. June 14, 2007).

29 *Id.* at *5.

30 *See, e.g.*, Newby v. Enron, 338 F.3d 467, 469 (5th Cir. 2003).

Second, the defendants may exhaust all of their assets on their defense against the criminal charges — or the stay may give them time to hide their assets — leaving very little to satisfy a judgment in your civil case. If you are concerned about this, you may want to consider filing a notice of *lis pendens*[31] (also called "notice of pendency") or a mechanics or construction lien[32] on the defendants' property, though these mechanisms are somewhat limited. You may also want to file a motion for an Order of Attachment[33] or for a temporary restraining order and preliminary injunction prohibiting the sale or transfer of assets.[34]

You should also be mindful of any deadlines in your court's local rules. For example, many courts require plaintiffs bringing civil Racketeer Influenced and Corrupt Organization Act ("RICO") claims to file civil RICO case statements shortly after the initial complaint is filed.[35] Some courts also require that plaintiffs file their class certification motion within a set period of time.[36] Failure to comply with these deadlines, or to obtain an extension, may constitute abandonment of certain claims. You should not assume that a stay of discovery or a stay of the civil case stays these local deadlines. If a stay has not yet been issued, make sure you request an extension of the deadlines within the allotted time period. If a stay will be or has been issued, you should request that the stay order specify that these deadlines are also stayed.

Willingness of the Prosecution to Share Evidence with Plaintiff's Counsel

A grand jury indictment is perhaps the best source for information that is available to the prosecution. You should also frequently review the criminal case docket.[37]

The prosecution will not volunteer some evidence to you before it is presented at trial. However, the prosecution is required to provide any exculpatory evidence, or evidence that may be used to impeach the testimony or credibility of a witness, to the criminal defense counsel with sufficient time to allow defense counsel to prepare for trial.[38] You may want to ask the prosecution to provide these materials to you, as well. Keep in mind, though, that these materials are certainly within the scope of permissible civil discovery. Therefore, once civil discovery resumes, you should not have much difficulty getting these materials through a Rule 34 request for production of documents.[39] In addition to information bearing on claims and defenses in the civil and criminal cases, prosecutors may also share information regarding the extent and identity of defendants' assets.

You may be able to get some information to support your client's civil claims if you insist on being present during the prosecution's interview of your client. Keep in mind, however, that you cannot be present during your client's grand jury testimony.

Once the criminal prosecution is over, you should be able to get some evidence through the Freedom of Information Act ("FOIA") and your state's equivalent public records law. Be sure to send FOIA requests to all agencies that were involved in the investigation, including ICE (formerly the INS), FBI, U.S. Department of

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31 *See generally* 51 Am. Jur. 2d *Lis Pendens* §§ 1-76.

32 Without taking a position as to the article's conclusion, the authors recommend Ethan Glass, *Old Statutes Never Die,* 27 Ohio N.U.L. Rev. 67 (2000) for a helpful review of states' mechanics lien laws.

33 *See* Fed. R. Civ. P. 64.

34 A sample motion for an order of attachment or a preliminary injunction is available upon request from author Werner.

35 *See, e.g.*, NDNY Local Rule 9.2 (requiring civil RICO statement to be filed within 30 days of the initial pleading alleging civil RICO claims).

36 *See, e.g.*, WDNY Local Rule 23(d) (class certification motion must be filed within 120 days of pleading alleging a class action).

37 You can access case filings from most federal courts at the PACER website: www.pacer.uscourts.gov. You must sign up for PACER, and there is a nominal fee for this service.

38 *See* Giglio v. United States, 405 U.S. 150, 153 (1972); *see also* Brady v. Maryland, 373 U.S. 83, 86-88 (1963).

39 There may be restrictions on how you use some documents stemming from the criminal prosecution, and particularly transcripts of grand jury testimony. Even if grand jury transcripts were inadvertently provided to you, you may risk criminal or civil liability if you do not inform the prosecutor that you have the transcripts — and confirm with the prosecutor that the transcripts are in the public domain — before using the transcripts in your lawsuit or providing them in discovery.

Labor ("USDOL"), and the U.S. State Department. Every federal agency should have regulations governing requests for production of agency documents or testimony, commonly referred to as *Touhy* regulations.[40]

E. Impact of Your Client's Prior Statements on the Criminal Prosecution

Be aware that non-privileged statements your client makes, or statements you make on your client's behalf, may be used by the criminal defense if the statements are non-hearsay or fall within one of the hearsay exceptions.[41] It is best to err on the side of caution. Clients should be advised not to discuss the case with anyone not covered by one of the privileges.[42] As an attorney, you should also be circumspect in any public statements.

The most easily admissible statements are prior statements made under oath by the witness, as these statements are considered non-hearsay.[43] Therefore, if your client has provided any sworn testimony, including deposition testimony as part of the civil litigation, before the introduction of evidence at the criminal trial, the criminal defense is very likely to review the testimony with a fine-toothed comb to find any inconsistencies. Therefore, as discussed above, it benefits the criminal prosecution, and hence your client, to support a stay of the civil proceedings until the conclusion of the criminal case.

F. Admissibility in the Civil Action of Your Client's Statements Made in the Course of the Criminal Investigation

Any sworn testimony given by your client as part of the criminal proceeding (e.g., grand jury or trial testimony) most likely will be admissible in the civil litigation. Additionally, police reports — and therefore your client's statements contained in police reports — will likely be admissible under the Federal Rule of Evidence 803(8)(C) hearsay exception, unless the sources indicate lack of trustworthiness.[44] Further, there is no sweeping law enforcement or confidential informant privilege,[45] though courts recognize a law enforcement privilege under many circumstances.[46] Courts have also recognized an "informer's privilege" in cases brought by the U.S. Secretary of Labor for violations of the FLSA, allowing the USDOL to withhold information about the identities of informants.[47]

IV. ASSESSING YOUR CLIENT'S CREDIBILITY

Essentially, there are two separate questions that must be answered in assessing your client's credibility. First, as your client's attorney, you must determine the truthfulness of your client's story.[48] Second, you should assess the factors the defense will use to attack your client's credibility. Some of these factors are described below.

A. Impact of Prior Criminal and/or Immigration-Related Offenses

Most trafficking victims committed an immigration-related offense by entering the United States without inspection, overstaying a visa, or possessing fraudulent immigration documents. Therefore, the question of

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40 *See* United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951); *See, e.g.*, 6 C.F.R. §§ 5.1-5.49 (U.S. Department of Homeland Security *Touhy* regulations); 29 C.F.R. §§ 70.1-70.54 (U.S. Dept. of Labor *Touhy* regulations).

41 *See generally* Fed. R. Evid. 801-804; *cf.* Fed. R. Evid. 613 (regarding examining a witness or introducing evidence concerning prior statements).

42 *See generally* Fed. R. Evid. 501; *cf.* Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996) (stating that consultations with mental health professionals are generally privileged); U.S. v. Hayes, 227 F.3d 578, 585-86 (6th Cir. 2000) (there is no "dangerous patient" exception to the therapist-patient privilege). For a more detailed discussion of therapist-patient privilege, *see* Chapter 2, § I(D), *infra.*

43 Fed. R. Evid. 801(d)(1).

44 *See, e.g.*, Miller v. Field, 35 F.3d 1088, 1091 (6th Cir. 1994) (explaining when hearsay in a police report lacks trustworthiness).

45 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 698 (1972).

46 *See, e.g., In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 569 n.1 (5th Cir. 2006) (reviewing Circuit Court decisions supporting law enforcement privilege).

47 *See, e.g.*, Doe v. Advanced Textile Corp., 214 F.3d 1058, 1072-73 (9th Cir. 2000); Dole v. Local 1942, Int'l Bhd. of Elec. Workers, 870 F.2d 368, 375 (7th Cir. 1989); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145-46 (6th Cir. 1977).

48 *See* Fed. R. Civ. P. 11(b) (by signing and filing a document with the Court, the attorney certifies that he or she conducted a reasonable inquiry).

whether the defense can use these offenses to attack your client's credibility is very likely to arise in the course of the civil litigation.

Generally, specific acts are admissible to attack a witness's credibility if, at the discretion of the court, the acts are probative of untruthfulness.[49] Therefore, courts have allowed, for example, prior use of a false name,[50] and filing of false or forged tax returns[51] to prove untruthfulness. However, even if such evidence is probative of untruthfulness, the court may still refuse to admit this evidence because its probative value is substantially outweighed, *inter alia*, by the danger of unfair prejudice.[52]

Immigration-related offenses generally will not be admissible, even to the extent that they may impinge your client's credibility — though there is some dispute over this. Mechanisms to avoid the disclosure of your client's immigration status are discussed in Chapter 2, § I(C), *infra*. Still, unlike most employment law cases, in civil litigation involving victims of trafficking, the plaintiff's immigration status at the time of his or her victimization is likely to be an essential element of the plaintiff's claim. In most trafficking cases, it is one of the elements the trafficker used to compel forced labor. Therefore, it makes little sense to try to prevent this information from surfacing.

B. How the Defense May Use Your Client's Benefits under the TVPA to Attack Your Client's Credibility

If your client has received resettlement benefits under the TVPA, the defense will likely try to introduce evidence of these benefits to support an argument that your client fabricated his or her story in order to obtain the benefits. In the civil action, your best argument is that your client's benefits are simply not relevant. The benefits are tied to participation in the criminal action and are not at all impacted by the civil action.

V. HOW TO HANDLE A RELEASE OR WAIVER SIGNED BY YOUR CLIENT

If your client signed any kind of a waiver purporting to release the trafficker from liability, it is very unlikely that the waiver will be binding. With some exceptions, the applicability of a waiver of rights will be governed by state law. Still there are some factors that generally apply. These include:

> (1) The clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law.[53]

In labor exploitation cases — and particularly in human trafficking cases — many, if not all, of these factors will often lean in favor of the worker's position that the waiver is not enforceable.

A waiver also may not be valid for unconscionability. In one human trafficking case, the plaintiff had signed a waiver in exchange for some wages soon after she left the trafficking situation. The defendants filed a motion to dismiss based in part on the waiver. The Court denied the motion, finding that the plaintiff had presented a

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49 *See* Fed. R. Evid. 608(b).

50 *See, e.g.*, United States v. Ojeda, 23 F.3d 1473, 1476-77 (8th Cir. 1994); McIntyre v. Bud's Boat Rental, L.L.C., No. 02-1623, 2003 U.S. Dist. LEXIS 16487, at *4 (E.D. La. Sept. 8, 2003) (use of aliases can be used to impeach plaintiff's credibility).

51 *See* Chnapkova v. Koh, 985 F.2d 79, 82-83 (2d Cir. 1993); Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 681 (S.D.N.Y. 2001).

52 *See* Fed. R. Evid. 403; *see also* United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987) (upholding exclusion of testimony regarding illegal entries into the U.S. not resulting in convictions).

53 *See* Torrez v. Public Service Co., 908 F.2d 687, 689-90 (10th Cir. N.M. 1990) (quoting Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988)).

colorable claim of unconscionability based on the gross disparity between the amount the plaintiff received in exchange for the waiver and the wages the plaintiff was actually owed.[54]

It is worth noting, as well, that "waivers of federal remedial rights ... are not lightly to be inferred."[55] This is particularly true in the context of minimum wage and overtime claims under the FLSA. In FLSA cases, courts recognize waivers in only two circumstances: (1) waivers that are supervised as part of a USDOL enforcement action, or (2) a court-supervised settlement of a private suit for back wages.[56]

VI. LIMITATIONS ON CERTAIN TYPES OF TRAFFICKING CASES

Certain types of trafficked workers may be faced with additional limitations on the viability of their lawsuits against their traffickers. Such hindrances have appeared in cases involving trafficked domestic workers and sex workers, sometimes preventing a successful lawsuit altogether.

A. Domestic Workers

Domestic workers, who, according to reports from advocates and the USDOJ, constitute a large percentage of trafficking cases,[57] continue to lack sufficient employment and labor protections. The National Labor Relations Act ("NLRA") does not include domestic workers under its definition of "employee" and therefore, provides no protection for domestic workers from employer retaliation for striking or collective bargaining.[58] Individual domestic workers working in private homes are ineligible to assert violations of sex, race, or national origin discrimination under Title VII.[59] Live-in domestic workers are not entitled to overtime pay under the FLSA.[60] Finally, domestic workers employed by foreign diplomats cannot hold their employers accountable for workplace violations as diplomats enjoy immunity from civil, criminal, or administrative liability within the United States.[61] While an exception to immunity exists for "any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions,"[62] the Fourth Circuit ruled in *Tabion v. Mufti,*[63] that "commercial activity" includes only activities for personal profit, explicitly stating that domestic workers are not "commercial activity." Thus, pursuant to *Tabion,* domestic workers are denied claims against their diplomat employers in the civil justice system.

B. Sex Workers

To date, civil lawsuits utilizing the TVPRA on behalf of victims of sex trafficking have been few and far between.[64] There may be sound reasons for the infrequency of TVPRA lawsuits in sex trafficking cases. The authors of this manual encourage practitioners and advocates to think carefully about the fragile circum-

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54 *See* Deressa v. Gobena, No. 05 Civ. 1334, 2006 U.S. Dist. LEXIS 8659, at *6-8 (E.D. Va. Feb. 13, 2006).

55 *Torrez*, 908 F.2d at 689.

56 *See, e.g.,* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-54 (11th Cir. 1982); Manning v. New York Univ., No. 98 Civ. 3300, 2001 U.S. Dist. LEXIS 12697, at *35-36 (S.D.N.Y. Aug. 21, 2001), *aff'd* 299 F.3d 156 (2d Cir. 2002); *see also* Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) (private settlements of FLSA suits would "allow [parties] to establish sub-minimum wages."); *cf.* Maynor v. Dow Chem. Co., Case No. G-07-0504, 2008 U.S. Dist. LEXIS 42488, *29-34 (S.D. Tex. May 28, 2008) (discussing USDOL settlements, and finding that workers did not waive their right to sue under the FLSA by accepting payment arising out of USDOL action).

57 McMahon, *supra* note 32.

58 42 U.S.C.A. 12111 § 5(a) (2001).

59 42 U.S.C.A. 12111 § 5(a) (2001). Title VII applies to employers with fifteen or more employees. Because domestic workers are frequently the sole employee in the workplace, they are excluded from Title VII protection.

60 29 U.S.C.A. §§ 213(a)(15), 213(b)(21).

61 Human Rights Watch, Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States 34-35 (2001).

62 Vienna Convention on Diplomatic Relations art. 31(c), Apr. 18, 1961, 23 U.S.T. 3227.

63 73 F.3d 535 (4th Cir. 1996).

64 Doe I v. Reddy, No. 02 Civ. 05570, 2003 U.S. Dist. LEXIS 26120, at *13 n.2, *33 & n.4, *35-36 (N.D. Cal. Aug. 4, 2003), pre-dated the TVPRA, but does serve as an example of a civil case brought on behalf of plaintiffs who were trafficked both for labor and sex.

stances of sex trafficked clients and the consequences of civil suits on their progress toward rehabilitation and stability. Some of these considerations are described below.

First, criminal prosecutions in sex trafficking cases are far more likely to occur than prosecutions in labor trafficking cases. The USDOJ's focus on enforcement of sex trafficking crimes is the official policy of the Bush Administration.[65] As a result, over two-thirds of federal trafficking prosecutions are cases of sex trafficking,[66] which conflicts with empirical reports from service providers who have found that sex trafficking cases comprise only one-third of their caseload.[67] The zealously pursued prosecutions of sex trafficking crimes subjects victims in these cases to severe re-traumatization. Such victims must repeatedly divulge the facts of their cases to prosecutors, investigating officers and ultimately, juries. They must face their traffickers in trial and testify against them. Their traffickers, agents within a large criminal network, can and often will utilize their networks to retaliate against victims.

Second, sex trafficking cases present unique factors that impact a potential civil lawsuit.[68] First, since a criminal prosecution is likely in a sex trafficking case, if successful, victims may receive and be satisfied with the monetary compensation received through restitution. Second, state and federal employment and labor laws, which generally provide the bulk of claims for compensatory damages in civil suits, exclude victims of forced prostitution since prostitution is not recognized as legal work. Finally, due to the clandestine nature of sex trafficking crimes, it is often much more difficult to identify defendants and locate assets.

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65 Press Release, White House Off. of the Press Secretary, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003) (describing President Bush's National Security Presidential Directive 22 (NSPD 22) which identifies trafficking as an important national security issue and emphasizes criminal enforcement against prostitution as the primary method by which to combat human trafficking). NSPD 22 is a classified document, and therefore, unavailable to the public, however, a USDOJ report cites to NSPD 22 and its efforts to implement it. *See* USDOJ, Report on Activities to Combat Human Trafficking: Fiscal Years 2001-2005, 6 (2006), *available at* www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

66 For example, in 2005, the USDOJ reported that over two-thirds of ninety-one human trafficking cases were cases of sex trafficking. U.S. Dep't of Just., Report on Activities to Combat Human Trafficking: Fiscal Years 2001-2005, 25 (2006), *available at* www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

67 For example, a recent study by the Coalition to Abolish Slavery and Trafficking reports that clients trafficked to Los Angeles are subject to exploitation in many fields, including domestic work (40%), factory work (17%), sex work (17%), restaurant work (13%), and servile marriage (13%). Kathryn McMahon and Coalition to Abolish Slavery and Trafficking, Speaking Out: Three Narratives of Women Trafficked to the United States (2002).

68 *See generally* Jennifer Nam article.

CHAPTER 2
PROCEDURE

I. PROTECTING YOUR CLIENT FROM THE TRAFFICKERS

A. The Use of Pseudonyms in the Complaint to Conceal Your Client's Identity

If you or your client is concerned that the defendants will attempt to retaliate once the defendants learn of the lawsuit, you should try to use pseudonyms in the complaint. The leading case on this subject is *Doe v. Frank*,[1] which sets forth factors the court may consider when determining whether a plaintiff may proceed anonymously.[2] In the trafficking context, one court allowed plaintiffs to proceed using pseudonyms based on the defendants' previous use of threats as alleged in a parallel criminal indictment, and because of the government's interest in protecting the identity of potential witnesses in the criminal case.[3] In another human trafficking lawsuit, the Court allowed the plaintiffs to proceed anonymously where law enforcement officers found firearms in the home of one of the traffickers, a paralegal working for the plaintiffs' counsel overheard family members of the defendants making threatening comments about the plaintiffs, and the Complaint includes "allegations of violence and coercion by the contractor defendants against the plaintiffs."[4] This was "sufficient to overcome the presumption of open judicial proceedings."[5]

The mechanics for filing a lawsuit on behalf of anonymous plaintiffs vary between the circuits, with some circuits providing little or no guidance on the subject. In the *Does I-IV v. Rodriguez* human trafficking litigation,[6] plaintiffs' counsel filed a motion to proceed anonymously before filing the Complaint, based on Tenth Circuit guidelines.[7] The motion was assigned a miscellaneous case number. Plaintiffs' counsel then referenced the motion and the miscellaneous case number in the Complaint. In the *Javier H. v. Garcia-Botello* trafficking litigation, plaintiffs' counsel filed their motion to proceed anonymously contemporaneously with the initial Complaint.[8] In other contexts, counsel has filed under seal a complaint using the plaintiff's real name, but used a pseudonym in the Complaint in the public file.[9]

B. Temporary Restraining Orders and Preliminary Injunctions

If there is an immediate risk of harm to your client, you may wish to seek a temporary restraining order ("TRO") and/or a preliminary injunction. For example, you may want to seek a TRO or preliminary injunction to prevent the defendants from contacting your client and your client's family.[10] To obtain a TRO or preliminary injunction, a plaintiff first must establish that he will suffer irreparable harm if no injunction is issued. Then, a plaintiff generally must show "(1) that he or she will suffer irreparable harm absent injunctive relief, and (2) either (a) that he or she is likely to succeed on the merits, or (b) that there are sufficiently serious

1 951 F.2d 320 (11th Cir. 1992).
2 *Id.* at 323 (citing Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981)).
3 *See Javier H.*, 211 F.R.D. 194 (W.D.N.Y. 2002).
4 *See* Does I-IV v. Rodriguez, No. 06-CV-00805-LTB, 2007 WL 684114, at *2 (D. Colo. March 2, 2007).
5 *Id.* at *3.
6 *Id.*
7 *See* W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001).
8 *See Javier H.*, 211 F.R.D. at 195.
9 *See, e.g.*, EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 113 (E.D.N.Y. 2003).
10 As discussed in Chapter 1, § III(D), *supra*, you may also want to seek a TRO to prevent the Defendant from transferring ownership of his or her assets.

questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party."[11]

Specifically obtaining a TRO can be difficult, and courts are even more reluctant to issue an *ex parte* TRO. A TRO is a court order that enjoins a party from engaging in a particular action. The TRO remains in effect until the court rules on your motion for a preliminary injunction, which can take a long time, depending on the weight of the court's docket. Unless you are seeking an *ex parte* TRO, the court will hear arguments on the motion for a TRO once notice is given to the opposing party.

Generally, if you are seeking a TRO, you must also prepare a motion for an expedited hearing, where you will indicate when you expect to serve the opposing party. You will also have to draft a proposed Order to Show Cause. Usually, a party seeking a TRO will hand-deliver the motion papers to the court and will wait for the assigned judge to issue the order to show cause. The order to show cause must then be personally served (usually within the next 24-48 hours) on the opposing party. *Consult your local rules and talk to the clerk of the court before seeking a TRO.* Most courts have very specific and sometimes convoluted rules that must be followed when seeking a TRO.

C. Protective Orders

Once the litigation proceeds into discovery, defendants are likely to seek information about your client that may jeopardize your client's security or privacy. For example, defendants may ask for your client's immigration status, current address and employer, and for information on your client's hometown address in his or her country of origin. In a case where security is not a concern, this type of background discovery is usually acceptable. However, where retaliation is a concern, this information can put the safety of your client and his or her family in jeopardy.

If the defendants seek this information in discovery, you should move for a protective order. The court may limit discovery where the disclosure would present a "danger of intimidation" which could "inhibit plaintiffs in pursuing their rights."[12] In one case, the court prevented the disclosure of the plaintiffs' addresses and employers where a member of the defendants' family had publicly accused the immigrant workers of being members of a terrorist "sleeper cell."[13] In that case, the court found that:

> [A]ssuming, *arguendo*, that information regarding plaintiffs' residences and places of employment could lead to evidence relevant to the defense of this action, ... any such evidence is clearly outweighed by the potential that this information may be used to harass, oppress, or intimidate the plaintiffs.[14]

The law is well developed in the area of preventing disclosure of immigration status, and there is very helpful language that can be borrowed from some decisions on this subject. One court, for example, determined that:

> [I]rrespective of whether the desperate, and illegal, effort of an indigent Mexican immigrant to work here seriously brings his character into question, it was not clearly erroneous ... to conclude that this evidence would be highly prejudicial.[15]

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11 Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 510 (2d Cir. 2005). There is some minor variation between the circuits with regard to the requirements for a TRO or a preliminary injunction. *Compare, e.g.,* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1201-02 (9th Cir. 2006) (same standard as 2d Cir. in *Moore*); *with* Straights & Gays for Equality v. Osseo Area Schs., 471 F.3d 908, 911 (8th Cir. 2006) (the court should consider "(1) the likelihood that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between the harm to the movant and the harm to the other party; and (4) the public interest."); *and* Sanofi-Synthelabo v. Apotex, Inc., 470 F.3d 1368, 1374 (Fed. Cir. 2006) (same).

12 Liu v. Donna Karan Int'l Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (quoting Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001)).

13 Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59, 61-62 (W.D.N.Y. 2003).

14 *Id.*

15 Romero v. Boyd Bros. Transp. Co., No. 93-0085-H, 1994 U.S. Dist. LEXIS 8609, at *7 (W.D. Va. June 14, 1994).

In fact, there is a plethora of case law supporting the non-discoverability of immigration status,[16] with only a few courts taking a contrary position.[17]

Defense counsel may also argue that the U.S. Supreme Court's decision *Hoffman Plastic Compounds v. NLRB*[18] makes immigration status relevant to damages. So long as your client's wage claims are for work that was performed, such a position would be misguided. Still, the impact of *Hoffman Plastics* on claims for lost future wages resulting from an illegal firing has yet to be clearly addressed by the courts. For a more detailed discussion of *Hoffman Plastics, see* Chapter 3 § V(H)*, infra.*

The argument to prevent the disclosure of your client's current employer or address is essentially the same as the argument to prevent disclosure of immigration status. You may also present the alternative argument that, if these matters are to be disclosed, they should not be disclosed to the defendants, but rather only to their counsel.[19]

With respect to information about the plaintiff's current employer, several cases are on point. In *Doe v. Handman*,[20] a plaintiff obtained a protective order protecting her present and former employers and business acquaintances from being deposed by defendants. The court noted that plaintiff had demonstrated a "legitimate personal harm" in showing that her job would be in jeopardy if her employer knew of the pendency of her case.[21] Moreover, the defendant had not met his burden of showing that depositions of these individuals would be relevant to the plaintiff's cause of action. For these reasons, the *Handman* court granted to the plaintiff the protective order requested.

In *Graham v. Casey's Gen. Stores*, the court noted that a subpoena sent to a plaintiff's current employer "could be a tool for harassment and result in difficulties for [the plaintiff] in her new job."[22] The defendant had sought through the deposition of the plaintiff's current employer information as to whether the plaintiff had filed prior lawsuits or administrative charges in connection with this new job. The court, however, quashed the defendant's subpoena, requiring the defendant to provide independent evidence that there had been any such prior lawsuits or administrative charges.[23] These cases suggest that allowing access to a current employer poses a significant risk to a plaintiff in an employment matter. Allowing a defendant to discover a plaintiff's current landlord could present similar problems.

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16 *See, e.g., In re* Reyes v. Remington Hybrid Seed Co., 814 F.2d 168, 170-71 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); Montoya v. S.C.C.P. Painting Contrs., Inc., 530 F. Supp. 2d 746, 749-50 (D. Md. 2008); Recinos-Recinos v. Express Forestry, Inc., No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *43-45 (E.D. La. Jan. 23, 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); Garcia-Andrade v. Madra's Cafe Corp., No. 04-71024, 2005 U.S. Dist. LEXIS 22122 (E.D. Mich. Aug. 3, 2005); *Liu*, 207 F. Supp. 2d at 191; Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002). Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998); *cf.* Samborski v. Linear Abatement Corp., No. 96 Civ. 1405, 1997 U.S. Dist. LEXIS 1337, at *3-4 (S.D.N.Y. Feb. 10, 1997) (the FLSA applies equally to documented and undocumented workers) (citing Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988)); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 204-05 (E.D.N.Y. 1996) (a plaintiff's undocumented status "is not a bar to recovery in federal court").

17 *See, e.g.,* Samborski v. Linear Abatement Corp., No. 96 Civ. 1405, 1997 U.S. Dist. LEXIS 1337, at *2-3 (S.D.N.Y. Feb. 10, 1997) ("[W]hile I am not at this point deciding whether [commission of immigration offenses is] properly admissible at trial, I do find that it may be relevant as to plaintiffs' credibility and as such is discoverable.").

18 535 U.S. 137, March 27, 2002

19 *See, e.g.*, Brown v. City of Oneonta, 160 F.R.D. 18, 21 (N.D.N.Y. 1995).

20 No. 95 Civ. 8005, 1999 U.S. Dist. LEXIS 17856, at *11-14 (S.D.N.Y. 1999).

21 *Id.* at *13.

22 206 F.R.D. 251, 256 (S.D. Ind. 2002).

23 *Id.; see also Centeno-Bernuy*, 219 F.R.D. 59, 61-62 ("to enable [defendants] to discuss plaintiffs' allegations of illegal treatment by their former landlords/employers with plaintiffs' current landlords and/or employers, is inherently intimidating"); *cf.* Conrod v. Bank of N.Y., No. 97 Civ. 6347, 1998 U.S. Dist. LEXIS 11634, at *5 (S.D.N.Y. July 30, 1998) (noting the "negative effect that disclosures of disputes with past employers can have on present employment" and sanctioning defendants for subpoenaing plaintiff's current employer without conferring with the court and plaintiff's counsel).

Still, you should keep in mind that you probably will not be entitled to prevent discovery of work history if you include a claim for lost wages based on an illegal termination. Defendants would argue, probably correctly, that subsequent employment would mitigate lost wages and therefore is relevant to damages.[24]

A protective order may also be appropriate where a defendant takes action designed to intimidate participants in a lawsuit. In *EEOC v. City of Joliet*,[25] the U.S. District Court for the Northern District of Illinois issued a protective order in a Title VII case preventing the defendant from requiring employees to complete I-9 forms, where this was not the defendant's practice before the litigation. The court found that "the main purpose behind this alleged new found desire to abide by the law is to effect a not-so-subtle intimidation of the intervener, plaintiffs, and all the potential class members. Such actions are meant to, and if unchecked most certainly will, chill the exercise of the employees' Title VII rights — which rights the current lawsuit was filed to safeguard."[26]

Your claim for a protective order should be bolstered by any evidence (such as the criminal indictment) of prior efforts to intimidate your client. It is even stronger if the court already allowed your client to proceed using a pseudonym. It logically follows that, if the plaintiff's identity cannot be revealed, information that would subject him or her to identification, and therefore intimidation, must also be protected from discovery.

D. Protecting Others

Anyone with knowledge of your client's case — witnesses, friends, family members, Good Samaritans, even social service providers — may also face intrusive discovery requests. If revealing their identifying information puts their safety in jeopardy, it may also be concealed through protective orders. However, their knowledge of the case does risk exposure to the defendants since their communications with the client do not necessarily enjoy the same privilege that exists between the attorney and client. Typically, testimony from those playing a supportive role in your client's life will help to corroborate your client's case.

While the supporting testimony of social service providers may also be to the benefit of your client's case, there is good reason to keep certain information confidential, such as written notes taken in the course of treatment that may damage your client's credibility or other information that your client simply does not want revealed. The Supreme Court has held that communications between a psychotherapist and patient in the course of treatment are privileged and therefore, protected from discovery.[27] Psychotherapist is defined as psychiatrist, psychologist, and clinical social worker. Each *must* be licensed. The Supreme Court has not determined whether this privilege extends to non-licensed social service workers. However, some lower federal courts have extended the privilege to non-licensed counselors.[28] State evidence codes and case law may differ in the application of the psychotherapist-patient privilege.

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24 *See, e.g.*, EEOC v. Woodmen of the World Life Ins. Soc'y, No. 03 Civ. 165, 2007 U.S. Dist. LEXIS 7488, at *12-16 (D. Neb. Feb. 1, 2007).

25 239 F.R.D. 490 (N.D. Ill. 2006).

26 *Id.* at 492.

27 *Jaffee*, 518 U.S. at 9-10.

28 *See* Oleszko v. State Comp. Ins. Fund, 243 F. 3d 1154, 1157 (9th Cir. 2001) (extending the psychotherapist-patient privilege to counselors at an employment assistance program who "[a]re trained as counselors, are held out as counselors ... and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how to best assist them."); *see also* United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996) (extending privilege to rape crisis counselors). *But see* Jane Student 1 v. Williams, 206 F.R.D. 306 (S.D. Ala. 2002) (refusing to extend privilege to unlicensed counselors at a mental health center).

II. INDIVIDUAL ACTIONS VERSUS CLASS ACTIONS, REPRESENTATIVE ACTIONS, AND MASS ACTIONS

A. A Brief Introduction to Class Actions, Representative Actions, and Mass Actions in the Context of Trafficking Cases

Most cases of trafficking are limited to a small number of victims. However, cases occasionally arise with large numbers of victims. Often, these victims are difficult to locate, are intimidated by the legal process, or the traffickers prevent them from accessing an attorney and the courts. Where there are large numbers of victims, you should consider bringing the civil litigation as a class action, a representative action, and/or a mass action.

A federal class action is brought pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"). Most causes of action may be brought on behalf of a Rule 23 class, with the notable exception of the FLSA, the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA"). In a Rule 23 class, individuals who meet the class definition are automatically members of the class, though in Rule 23(b)(3) they may affirmatively opt out of the class. Therefore, unless a class member opts out, the class member is bound by any judgments or court decisions in the class action. In a class action, the statute of limitations is tolled for all class members when the class action Complaint is filed, but it starts to run for an individual eligible class member once the individual opts out of the action.

A representative action (frequently also referred to as a "collective action" or a "FLSA class action") is allowed only for actions brought under the FLSA, the ADEA, or the EPA. As discussed above, Rule 23 class actions are prohibited under each of these statutes. (Note that your state minimum wage, overtime, or employment discrimination laws most likely allow class actions.) In a representative action, a similarly situated employee must opt into the case by filing a consent to sue with the court. Unless a worker opts into the action, the worker is not bound by judgments or decisions of the court. However, in most cases (unless you can make an argument for equitable tolling) the statute of limitations is only tolled once the consent is filed.

A mass action is a lawsuit with multiple plaintiffs. Some include hundreds of plaintiffs. To file a mass action, you must only meet the requirements for joinder. More plaintiffs may be added later in the litigation by amending the complaint, so long as you have not passed the deadline to amend as set forth in the scheduling order. If defendants have not filed a responsive pleading to the prior complaint, or if no responsive pleading is required and no more than 20 days have passed since the prior complaint was served, you may amend the complaint as a matter of right.[29] Otherwise, you must either obtain written consent from the defendants to amend the complaint or file a motion for leave to amend.[30]

Finally, many courts allow hybrid actions, allowing a class action to proceed on claims subject to Rule 23 and a representative action for claims under the FLSA, the ADEA, or the EPA. These cases may also have mass action components.

B. Consider the Following Questions as You Evaluate Whether to Bring a Class Action or an Individual Action

- Does the case satisfy the requirements of Rule 23?
- Does your client want to be a class representative?
- Does your client understand the responsibilities of being a class representative and how bringing the case as a class action may impact your client's damages?
- Does your client have an understanding of the case?
- Does the defendant have the solvency to satisfy a class-wide judgment?

29 *See* Fed. R. Civ. P. 15(a).

30 *Id.*

- Do you have the time, and does your firm have the resources, to distribute class notice and to be class counsel?
- Is there a cap on damages under any of the statutes alleged to be violated?
- How might bringing the case as a class action impact the likelihood of settlement?
- Does Legal Services Corporation fund your program? (In which case, you cannot bring a Rule 23 class action.)
- Are there other attorneys who will be willing to co-counsel the case with you?
- How do courts in your jurisdiction approach class actions?

C. Rule 23 Class Actions

Requirements for Certification

In order for a case to be filed as a class action, the case must satisfy the numerosity, commonality, typicality, and adequacy of representation requisites of Rule 23(a).

With respect to numerosity, the unique nature of the trafficking case may allow for certification of a relatively small class because "Joinder of all members is impracticable."[31] Please consider that:

> Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers. Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.[32]

There is substantial overlap between the typicality question and the commonality question, and similar issues may arise in either context. Unlike commonality, however, which requires that all members of the class have common claims, the typicality requirement compares the claims of the *class representatives* with the claims of the remainder of the class. The most common problem with satisfying the typicality requirement arises when the class representatives lack standing to bring a claim alleged on behalf of the class,[33] or the representatives' claims are time-barred.[34]

In the trafficking context, commonality and typicality questions may arise if the class consists of many victims over several years, or if different class members performed different jobs or were housed in different locations. These scenarios should not present a problem for certification.[35] The adequacy of representation prong

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31 Fed. R. Civ. P. 23(a)(1).

32 Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (citations omitted); *cf.* Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 645 (4th Cir. 1975) ("Where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable.").

33 *See, e.g.,* Cornett v. Donovan, 51 F.3d 894, 897 n.2 (9th Cir. 1995), *cert. denied,* 518 U.S. 1033 (1996).

34 *See, e.g.,* Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1347 (11th Cir. 2001).

35 *See, e.g.,* Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 371 (S.D.N.Y. 2007) (commonality and typicality found although class members worked with different kinds of animals, and the plaintiffs worked in feeding while other class members worked in slaughtering and packaging.); Does I v. Gap, Inc., No. 01 Civ. 0031, 2002 WL 1000073, at *2-3 (D. N. Mar. I. 2002) (in human trafficking case, although plaintiffs' experiences giving rise to the causes of action vary significantly, commonality existed because plaintiffs' injuries, "[a]lthough different, all stem from the same alleged conspiracy among the defendants …," and typicality was found on the same basis); Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 87 (S.D.N.Y. 2001) (class members working during different periods of time does not defeat typicality); Ramirez v. DeCoster, 203 F.R.D. 30, 36 (D. Me. 2001) (in AWPA case, class certified although "[n]ot every job or every housing unit was identical."); Rodriguez v. Carlson, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (AWPA class certified "[although] there might be some variances regarding the housing conditions of the class members"); Siedman v. Am. Mobile Sys., Inc., 157 F.R.D. 354, 360-61 (E.D. Pa. 1994) (commonality found although damages differed among class members but common questions of liability predominated). Though not addressed in the class certification context, Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 332-35 (D.N.J. 2005) has an enlightening discussion of the extent to which one state's law should "[p]rovide the standard against which the sufficiency of Plaintiffs' allegations are measured" where plaintiffs worked in eight different states. The Court concluded that the legal standards for false imprisonment in New Jersey were sufficiently similar to the standards in the other seven states so as to allow plaintiffs to rely on New Jersey law. For class certification purposes, this could prove very helpful where state law class claims are brought for plaintiffs and class members in various states.

encompasses both the representation of the class by the named plaintiffs, and the quality of the legal representation provided by class counsel.[36] First and foremost, the courts will look for potential conflicts between the class representatives and the remainder of the class.[37] In trafficking cases, make sure your class representatives did not play a role in the trafficking. For example, if a class representative was used as a guard to assure that other victims did not leave a forced labor situation — even if the representative himself or herself was trafficked — the court may determine that he or she will not protect the interests of the class.

Courts may consider other factors, including those reflecting the honesty and trustworthiness of the class representative, such as a class representative's contradictory testimony.[38] This raises obvious questions for victims of trafficking, many of whom may have committed immigration offenses that a hostile court may determine impacts their credibility. Further, many trafficking victims lack formal education, which certainly will be highlighted by a party trying to resist class certification. Courts may also consider the class representatives' understanding of the case.[39] However, familiarity with the nuances of the legal theories in the case is not required.[40]

Unavailability for discovery may impact this prong.[41] In a trafficking case, the adequacy prong should not be impacted by a representative's undocumented status.[42] Still, a class representative who resides abroad and who is likely unable to lawfully enter the United States to participate in discovery *may* be deemed an inadequate representative, though there is apparently no case law directly on point. You may wish to present the importance of your client's presence in the United States as a class representative as an equity supporting your client's "T" visa application.

Finally, with respect to the adequacy of counsel, if you work for a small law office with limited resources or limited class action experience, you should consider bringing in a larger firm to co-counsel the case. In a trafficking case, you may need to distribute class notice abroad, which will require a substantial investment of resources.

Class Certification under Rule 23(b)(1)

Though rarely used as a basis for class certification, a class action may be maintained under Rule 23(b)(1) if "persecuting separate actions … would create a risk of inconsistent or varying adjudications … [which] would establish incompatible standards of conduct for the party opposing the class … "[43] In one human trafficking case, the Court certified a Rule 23(b)(1) class where plaintiffs sought to implement a monitoring program holding all defendants and various factories to the same standard of conduct.[44] Plaintiffs correctly indicated that:

> [A]bsent class action [*sic*], the defendants would be faced with potentially numerous lawsuits which could easily lead to conflicting injunctions that impose different standards of conduct, monitoring programs, and remedial rules on the various defendants.[45]

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36 *See* Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994).

37 *See, e.g.*, Retired Chicago Police Assn. v. City of Chicago, 7 F.3d 584, 598-99 (7th Cir. 1993), *cert. denied,* 519 U.S. 932 (1996).

38 *See, e.g.*, Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998). *But see* German v. Fed. Home Loan Mortgage Corp., 168 F.R.D. 145, 154 (S.D.N.Y. 1996) (credibility is only a factor if it relates to the issues in the litigation).

39 *See, e.g.*, Darvin v. Int'l Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y. 1985).

40 *See Iglesias-Mendoza*, 239 F.R.D. at 372 ("Rule 23 requires that the named plaintiffs have adequate personal knowledge of the essential *facts* of the case. … For the legal underpinnings of their claims, [they] are entitled to rely on the expertise of their counsel."); *Gap, Inc.*, 2002 WL 1000073 at *4 (same conclusion).

41 *See* Kline v. Wolf, 702 F.2d 400, 402-03 (2d Cir. 1983) (refusal to answer discovery questions is a factor indicating inadequate representation); *see also* Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.26 (2008) (class representative must "vigorously pursue the litigation in the interests of the class, including subjecting themselves to discovery.").

42 *See* Ansoumana, 201 F.R.D. at 87.

43 Fed. R. Civ. P. 23(b)(1).

44 *See Gap, Inc.*, 2002 WL 1000073 at *5.

45 *Id.*

Class Certification under Rule 23(b)(2)

A Rule 23(b)(2) class may be certified for injunctive or declaratory relief. You may be able to construe some monetary damages, such as front or back pay, as equitable relief within the purview of a Rule 23(b)(2) class if the injunctive or declaratory relief sought predominate.[46]

In a Rule 23(b)(2) class, as compared to a Rule 23(b)(3) class, notice to class members is not required and class members need not be provided the opportunity to opt out.[47] This, of course, makes a (b)(2) class far easier to litigate than a (b)(3) class. Additionally, in a (b)(3) class, common issues must *predominate*—a requirement absent from a (b)(2) class where the common issues must merely *exist*. Still, it is hard to imagine a scenario in a trafficking case where injunctive or declaratory relief would predominate sufficiently to meet the standards set forth in either *Allison*[48] or *Robinson*.[49] Therefore, it is most likely that class certification in a trafficking case would be sought under Rule 23(b)(2) only for injunctive relief, and certification of a (b)(3) class would be sought for monetary damages.

Class Certification under Rule 23(b)(3)

Rule 23(b)(3) requires (1) that common issues predominate over individual claims; and (2) that class treatment is superior to other adjudication methods.[50] In a trafficking case, the most significant obstacle to (b)(3) certification is the requirement that common questions predominate. However, even within the context of a Rule 23(b)(3) class action, this should not present a problem so long as the allegations involve a common scheme.[51] However, it is important to look at the law in your jurisdiction, as the circuit courts' approach to predominance varies.

In the context of human trafficking litigation, challenges to the predominance prong will most likely arise where there are allegations of fraud because, some courts suggest, these claims require a showing of individual reliance.[52] Still, it is possible to distinguish a trafficking-related fraud class action from the fraud alleged in cases, such as *Castano*.[53] Further, as detailed in Chapter 3, § IV(B), *infra*, the U.S. Supreme Court's recent decision in *Bridge v. Phoenix Bond & Indemnity Co.*[54] holds that individual reliance is not an element of civil RICO fraud. Some courts also will not find predominance where claims for damages arising out of emotional distress and "other intangible injuries" are sought.[55] For briefing related to these issues, please contact author Werner.

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46 *See* Robinson v. Metro N. Commuter R.R., 267 F.3d 147, 162-64 (2d Cir. 2001); *see also* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 332 (4th Cir. 2006) ("Rule 23(b)(2) class certification is proper in the Title VII context not *because* backpay is an equitable form of relief, but because injunctive or declaratory relief predominates despite the presence of a request for back pay."); *Gap, Inc.*, 2002 WL 1000073 at *6 (Rule 23(b)(2) class certified, although it is a "close call" as to whether monetary relief is "merely incidental" to injunctive relief); *but see* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) ("[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief.").

47 *See* Fed. R. Civ. P. 23(c)

48 *Allison*, 151 F.3d at 415.

49 *Robinson*, 267 F.3d at 162.

50 *Cf. Gap, Inc.*, 2002 WL 1000073 at *8 (superiority existed even though "30,000 class members worked in 28 different factories for numerous different departments and supervisors, at different times spanning a 13-year period.").

51 *See, e.g., Iglesias-Mendoza*, 239 F.R.D. 363, 372-73 ("[Minimum wage and overtime claims] are about the most perfect questions for class treatment. Some factual variation among the circumstances of the various class members is inevitable and does not defeat the predominance requirement."); *Gap, Inc.*, 2002 WL 1000073 at *7 (same conclusion); CV Reit, Inc. v. Levy, 144 F.R.D. 690, 699-700 (S.D. Fla. 1992) (predominance of common issues even though different misrepresentations and disclosures made over time).

52 *See, e.g.,* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

53 *See, e.g.,* Mounce v. Wells Fargo Home Mortg., Inc., 390 B.R. 233, 248-49 (Bankr.W.D.Tex. 2008) (granting class certification for common law fraud claims).

54 128 S.Ct. 2131 (June 9, 2008).

55 *See, e.g.,* Steering Committee v. Exxon Mobil Corp., 461 F.3d 598, 602 (5th Cir. 2006).

D. Representative Actions under the Fair Labor Standards Act

Procedure for Representative Action Certification

The FLSA allows plaintiffs to sue on behalf of themselves and "other employees similarly situated."[56] Plaintiffs may therefore seek court approval to bring the FLSA claims as a collective action on behalf of other workers. Procedurally, collective action certification usually occurs in two stages. Pre-certification (sometimes referred to as "conditional certification") allows you to obtain the names and addresses of all similarly situated workers from the defendants. It also allows for the distribution of court-authorized notice.[57] Once distribution of notice begins, prospective plaintiffs will have a set amount of time to opt into the lawsuit, though the amount of time courts will allow varies.[58] As the statute of limitations in a FLSA action is only tolled once an opt-in plaintiff files the consent to sue, you should seek pre-certification of the representative class very early in the litigation. This generally is not a problem, as the burden on plaintiffs to prove that there are other similarly situated individuals is very light.[59] The second stage — final certification — usually only becomes an issue if the defendant moves to decertify the collective action. At that point, if the court finds that the opt-in claimants are similarly situated "the collective action proceeds to trial, and if they are not, the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims."[60]

Discovery Considerations

Unlike a Rule 23 class action, class members who have opted into a representative action *may* be subject to discovery. However, courts typically, but not universally, allow for representative testimony,[61] reducing the burden of producing large numbers of opt-in plaintiffs for discovery. This may be particularly important in trafficking cases, where many of the opt-in plaintiffs likely live abroad.

Interrelationship with Rule 23 Class Certification

An action may simultaneously be a representative action for the FLSA components and a Rule 23 class action for other causes of action, and some courts — though not all — will certify a Rule 23 class solely for state minimum wage and/or overtime violations, while at the same time certifying a FLSA representative action.[62]

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56 FLSA, 29 U.S.C. § 216(b).

57 *See, e.g.,* Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 635 (S.D.N.Y. 2007); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 240-41 (N.D.N.Y. 2002).

58 *See, e.g., Cuzco*, 477 F. Supp. 2d at 635 (nine months allowed because "[m]any of the prospective opt-in plaintiffs are transient immigrant day laborers."); *Roebuck*, 239 F. Supp. 2d at 240-41 (nine months allowed because some prospective plaintiffs are transnational migrants); *but see* Salinas-Rodriguez v. Alpha Servs., L.L.C., No. 05 Civ. 440, 2005 U.S. Dist. LEXIS 39673, at *14 (S.D. Miss. Dec. 27, 2005) (request for eight months denied as "excessive" although prospective plaintiffs reside in remote locations in Guatemala and Mexico; 180 days allowed).

59 *See Cuzco*, 477 F. Supp. 2d at 632 ("unlike class certification under Fed. R. Civ. P. 23, 'no showing of numerosity, typicality, commonality and representativeness need be made' for certification of a representative action.) (internal citation omitted).

60 *Id.*

61 *See, e.g.,* Shultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 310 (4th Cir. 2006); Falcon v. Starbucks Corp., Case No. H-05-0792 (S.D. Tex. Jan. 15, 2008); Takacs v. Hahn Auto. Corp., No. C-3-95-404, 1999 U.S. Dist. LEXIS 22146, at *4-8 (S.D. Ohio Jan. 25, 1999); Adkins v. Mid-American Growers, Inc., 143 F.R.D. 171, 174 (N.D. Ill. 1992) (stating that discovery should be done on a representative basis); *but see* Coldiron v. Pizza Hut, Inc., No. 03-05865, 2004 U.S. Dist. LEXIS 23610, at *5-6 (C.D. Cal. Oct. 25, 2004) (individualized discovery of opt-in plaintiffs allowed); Tum v. Barber Foods, Inc., No. 00-371-P-C, 2002 U.S. Dist. LEXIS 297 (D. Me. Jan. 11, 2002) (sanctioning plaintiffs for failing to respond to discovery directed at opt-ins).

62 *See* Lindsay v. Gov't Employees. Ins. Co., 448 F.3d 416 (D.C. Cir. 2006) (Rule 23 class certified for NY Labor Law claims, and representative action certified for FLSA claims); *Iglesias-Mendoza*, 239 F.R.D. at 373-75 (same); *but see* DeAsencio v. Tyson Foods, Inc., 342 F.3d 301, 311, 311-12 (3d Cir. 2003) (denying Rule 23 class certification for PA labor law claims where FLSA representative action certification was also sought, because "novel and complex issues of state law were at stake").

E. Restrictions on Recipients of Legal Services Corporation Funding

Organizations receiving Legal Services Corporation ("LSC") funding may not represent plaintiffs in a Rule 23 class action or the state equivalent.[63] However, LSC-funded programs may bring representative actions or mass actions so long as each plaintiff or opt-in plaintiff otherwise meets LSC eligibility requirements.[64]

III. WHEN TO FILE THE CIVIL ACTION

A. Statute of Limitations

Watch for Short Statute of Limitations

If you primarily practice employment law, you may not be aware that the statute of limitations on some causes of action is quite short. For example, in New York and many other states, the statute of limitations for most intentional torts is one year.[65] For some causes of action, the statute of limitations may be six months or less. There also are strict and very short time limits for filing many administrative complaints, such as U.S. Equal Employment Opportunity Commission ("EEOC") charges, which may be prerequisites for bringing suit. You should immediately determine the causes of action and their respective statutes of limitations after being retained by a trafficking victim. Failure to do so may constitute malpractice if, as a result, your client is precluded from bringing certain claims.

Equitable Tolling

If a worker is held in bondage, or even in immigration custody, he or she has a strong argument that the statute of limitations should be equitably tolled for that time period. Bondage likely constitutes just the kind of extraordinary circumstance contemplated in the equitable tolling doctrine.[66] In the trafficking context, at least two courts have found that the statute of limitations should be equitably tolled under these circumstances.[67]

You also may be able to argue that the two-year statute of limitations for FLSA actions (three years for willful violations) should be tolled if the employer failed to display a poster, as required by the FLSA, informing employees of their minimum wage and overtime rights.[68]

B. Consider the Impact on the Criminal Prosecution

If you do not need to toll a short statute of limitations, it is always best to wait to file a civil action until the conclusion of the introduction of evidence in a parallel criminal case. This way, you avoid altogether the question of whether a stay is necessary. Still, if you must file your civil action, there is no question that you are permitted to do so while the criminal action is pending.[69]

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63 *See* 45 C.F.R. § 1617.3 (2008).

64 Letter from LSC Office of Compliance and Enforcement, to Kenneth F. Boehm 8-9 (April 18, 2002) ("Congress expressly barred class actions, not representative action or other cases in which relief might be granted to more than a small group … of plaintiffs."), available upon request from author Werner. For additional LSC requirements, *see* Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504, 110 Stat. 1321(1996) (each plaintiff must be identified by name).

65 *See, e.g.*, N.Y. C.P.L.R. § 215 (2008).

66 *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (statute of limitations on Torture Victims Protection Act is tolled while plaintiff is imprisoned or incapacitated); National Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 360 (C.D. Cal. 1997); *cf.* Osbourne v. U.S., 164 F.2d 767 (2d Cir. 1947) (plaintiff's internment by Japan during World War II tolled the limitations period on his claim under the Jones Act against his employer for injury occurring immediately prior to his internment).

67 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *9-14 (defendant attempted to mislead plaintiff, who relied on misrepresentation in neglecting to file charge; and defendant's actions and threats "[c]onstitute affirmative acts designed to prevent [plaintiff] from obtaining her wages or taking steps to enforce her … rights."); Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *15-16 (S.D.N.Y. Dec. 3, 2003) (because employer took and held plaintiff's passport, "[s]he was unable to pursue her conversion claim before her escape from their home.").

68 *See* Chapter 3, § V(E), *infra*, for supporting cases.

69 *See* Smith v. Husband, 376 F. Supp. 2d 603, 612 (E.D. Va. 2005).

C. Media and Publicity Considerations

Legal battles are fought both in the courtroom and in the court of public opinion. An effective use of the media may benefit your client, while a less-than-circumspect approach may potentially be very damaging.[70]

IV. WHERE TO FILE THE CIVIL ACTION

A. State Court Versus Federal Court

Most trafficking cases will have both state and federal causes of action. Therefore, you will have a choice of filing your case in state or federal court. You should make your decision based on an evaluation of the forums available to you. Research the size of verdicts, the make-up of the potential jury pool, and the politics of the court in light of your client's claims, ethnicity and immigration status. Talk to experienced plaintiffs' lawyers in your area if you are not sure how to answer these questions.

B. Bankruptcy Court

When your client retains you, as soon as you know the identities of the potential defendants, you should check to see if any of them have filed for bankruptcy. Bankruptcy courts often impose a short time period during which creditors may file proofs of claim. If you miss that deadline, you may not be able to collect any money from the bankrupt debtor.

If one of the defendants is in bankruptcy or files for bankruptcy, any civil action against the debtor will usually be automatically stayed.[71] It is often helpful to have this automatic stay on the civil proceedings lifted.[72] In trafficking cases, which likely involve complex issues of federal law, your motion to lift the stay will likely be granted.[73]

You may also try to claim that your client's damages are exempt from dischargeability under section 523(a)(2) (services obtained by fraud) and/or (a)(6) (willful or malicious injury) of the U.S. Bankruptcy Code.[74]

If you are not familiar with bankruptcy procedure, you should contact a bankruptcy attorney who represents creditors. Most local bar associations have a bankruptcy section. The authors also have some limited materials regarding litigating in bankruptcy court.

C. Personal Jurisdiction/Venue

If it benefits your client, you may be able to assert personal jurisdiction over out-of-state defendants in the state where your client were recruited.[75] This may be helpful if the venue where your client was recruited

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70 *See* Chapter 1, § III(E), *supra*. For an interesting review of the ethics of an attorney's contact with the media, *see* Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Colum. L. Rev. 1811 (1995).

71 *See* 11 U.S.C. § 362(a). A creditor who violates the automatic stay may be subject to significant liability. *See* 11 U.S.C. § 362(k) ("an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages").

72 *See* 11 U.S.C. § 362(d).

73 *See* 28 U.S.C. § 157(d) (requiring withdrawal of the stay "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce"); *see also,* City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991) (Withdrawal is mandatory when a bankruptcy judge would be required "to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes"); *In re TPI Int'l Airways*, 222 B.R. 663, 667 (S.D. Ga. 1998); *In re* Am. Body Armor & Equip. v. Clark, 155 B.R. 588, 590 (M.D. Fla. 1993); *In re White Motor Corp.*, 42 B.R. 693, 703-04 (N.D. Ohio 1984).

74 *See* 11 U.S.C. §§ 523(a)(2), (a)(6) (2004).

75 *See, e.g.,* Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1187-93 (9th Cir. 2002).

would tend to view cases of this nature more favorably. Additionally, the cost of distant litigation may provide a strong incentive for defendants to settle the case. Still, if you pick a "friendlier" court, the court may still entertain a motion for a change of venue based on "[t]he convenience of parties and witnesses, [and] in the interest of justice. ..."[76]

V. WHOM TO NAME AS DEFENDANTS

Trafficking schemes frequently are multi-tiered. At the "bottom" may be the smugglers. Within the smuggling network may be the recruiters in the country of origin — those involved with moving the victims across borders and within the United States. Next may be labor contractors, who often are directly responsible for putting the "severe" in severe forms of trafficking. The labor contractors may have agents who help maintain control of the victims. Next, there are the employers. In situations where there are not labor contractors involved, the employers may have direct involvement in the severe form of trafficking. However, many employers retain contractors under the often mistaken belief that these "middle men" will isolate the employers from liability for labor law violations. Employers may range in size from individual homeowners who employ trafficking victims as housekeepers, to multi-national manufacturers or retailers who hire trafficking victims in their plants. Often there are several employers. For example, a small textile manufacturer and several large clothing producers may jointly and simultaneously employ trafficking victims.

In light of these frequently complex and convoluted layers, figuring out whom to sue can be a daunting challenge. At the lower end, the smugglers may be difficult to identify and impossible to serve. Frequently, the contractors and the small employers are the actors who end up under indictment and may be the easiest to name in a lawsuit. However, these individuals may lack the solvency to satisfy a large judgment on behalf of trafficking victims.

The larger entities, though frequently overlooked in criminal prosecutions or simply unindictable due to the government's burden of proof in a criminal action, should be named in civil litigation if they are joint employers and/or joint tortfeasors. Ultimately, these larger entities may end up paying the bulk of any judgment arising from the civil litigation.

A. What to Consider in Sex Trafficking Cases

Aside from suing the traffickers and procurers (such as pimps, owners of escort services, saunas, and other prostitution-related businesses) in sex trade trafficking cases, you may be able to sue the purchasers of the sex (the "Johns"), to the extent you are able to identify some of them, under a number of causes of action. You may even consider suing a class of defendant purchasers if, for example, through the records of the sex trade business you are able to establish the requisites for a class. The causes of action against the traffickers, procurers, and the purchasers may include the trafficking private right of action, intentional torts, such as assault, false imprisonment, and intentional infliction of emotional distress; you may also be able to bring actions under civil RICO and the Alien Torts Claims Act. (These causes of action are discussed in detail in Chapter 3, *infra*.) Additionally, some states have passed legislation giving a person the right to sue for damages caused by being used in prostitution,[77] though the volume of litigation under these statutes has been very limited.[78] Note also

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76 *See* 28 U.S.C. § 1404(a); *see also* Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *10 (D. Colo. Jan. 4, 2007) (in trafficking case, defendants' motion for change of venue denied because change would "[m]erely shift the inconvenience from one party to the other."); *but see* Olvera-Morales v. Int'l Labor Mgmt. Corp., No. 02 Civ. 1589, 2006 U.S. Dist. LEXIS 17923 (N.D.N.Y. Apr. 10, 2006) (Title VII case transferred to M.D.N.C. from N.D.N.Y.).

77 *See, e.g.*, Minn. Stat. 611A.81 (2008); Fla. Stat. ch. 796.09 (2008).

78 *See, e.g.*, Balas v. Ruzzo, No. 97-82, 1997 Fla. App. LEXIS 11860, at *7 (Fla. App. 5th Oct. 10, 1997) (example of litigation utilizing Florida statute but citing to no precedent under statute).

that the potential civil rights cause of action under the federal Violence Against Women Act,[79] appears to have been eliminated by the U.S. Supreme Court's decision in *United States v. Morrison*.[80]

B. Naming the Employers

Determining who Employed the Plaintiffs

If you do not know who employed your client other than the trafficker, you may wish to engage in some immediate discovery to determine this. The trafficker himself or herself should be able to shed some light on this question, as may your client. Keep in mind, however, that many courts apply a broad definition of "employ" to actions under the FLSA, and other statutes. Therefore, just because the trafficker was not necessarily an agent of a larger entity, you should not rule out suing the larger entity. Be careful, however, to look at the definition of "employ" for all of the labor-related causes of action in your complaint. Some statutes may have a definition that is more limited than the FLSA definition.

Before applying a joint employment analysis, you should first examine whether the larger entity directly employed the trafficking victims. If the victims were direct employees of the larger entity, you may be able to extend liability to the larger entity for labor law violations *and* for torts.

Agency and Vicarious Liability: When Employers May Be Liable for the Torts of the Traffickers

A larger entity may be liable for the torts of a smaller entity (e.g., traffickers) if (1) the larger entity employs a smaller entity; (2) the smaller entity employs trafficking victims; and (3) the employment of the trafficking victims is within the scope of the smaller entity's employment to the larger entities.[81] This rests on the existence of privity between the victims and the larger entity. In other words, where an agent has the principal's express or implied authority to hire subagents (trafficking victims), there is privity between the subagents and the principal.[82] As a result, "[t]he relation of agency exists between the principal and authorized subagent. Persons employed by an agent to perform the work of a principal are employees of the principal and not the employees of the agent."[83]

Unlike joint employment issues under federal statutes, state law generally controls questions of agency. Therefore, you should look at the law on agency in the jurisdiction where you will be filing the civil action.

Labor Law Violations: Joint Employment Standards

Larger entities often incorrectly argue that, if traffickers, for example, acted outside the scope of their agency while employing the plaintiffs, the plaintiffs are necessarily precluded from impugning liability to the larger entity. However, this theory errs by conflating joint employment theory and agency theory. A worker may, as a matter of economic reality, be economically dependent on two or more entities, and therefore, be jointly employed by these entities under the FLSA and some other labor laws. A worker's relationship as an employee of a second (and less directly involved) entity exists regardless of whether the first entity is acting as an independent contractor, an agent, or both. Joint employment liability hinges solely on the *worker's* economic dependency on two or more entities, not the relationship between the putative employers.[84]

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79 42 U.S.C. § 13981(c) (2008).

80 529 U.S. 598 (2000).

81 *See Gap, Inc.*, 2002 WL 1000068 at *19-20 (in trafficking case, agency between retailer and manufacturer was properly plead); *but see* Doe I v. Gap, Inc., No. 01 Civ. 0031, 2001 WL 1842389, at *12 (D.N.Mar.I. 2001) (agency not properly pled in prior complaint in aforementioned lawsuit).

82 *See* Herrington v. Verrilli, 151 F. Supp. 2d 449, 463 (S.D.N.Y. 2001) (citing Bank of the Metropolis v. New England Bank, 47 U.S. 212 (1948)).

83 *Id.* at 463 (quoting Marra v. Katz, 347 N.Y.S.2d 143, 147 (Sup. Ct. 1973)); *cf.* Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327-28 (5th Cir. 1985) (holding that if a farm labor contractor who recruited plaintiff farmworkers is an employee of the farmer, the farmworkers are the farmer's employees); Monville v. Williams, No. JH-84-1648, 1987 U.S. Dist. LEXIS 14488, at *13-14 (D. Md. October 8, 1987) (same); 29 C.F.R. § 500.20(h)(4) (2008) (same).

84 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (FLSA definition of "employ" has such breadth as to "stretch[] the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.").

The application of the "economic reality" test differs significantly between the circuits. Within the circuits, the test may be applied differently to different industries. The joint employment doctrine is particularly well-developed in agricultural labor — including in a recent farmworker trafficking case[85] — where the use of labor contractors is commonplace.[86] Courts also have addressed joint employment questions in other industries.[87] A decision in *Zavala v. Wal-Mart Stores, Inc.*,[88] a lawsuit with human trafficking elements, provides perhaps the most helpful and detailed recent review of joint employment standards under the FLSA.

One should be aware that a worker might be jointly employed by multiple entities, even if the worker's employment is not concurrently with all of the entities. For example, in *Bureerong*,[89] the Court found that plaintiffs adequately stated a cause of action alleging that nine separate purchasers were employers within the meaning of the FLSA.

The Corporate Veil: Why it Does Not Matter in Some Employment Law Cases, and Otherwise How to Sue a Principal at a Corporation[90]

It is a well-established principle that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."[91] This is not based on piercing the corporate veil, but rather on the employee's economic dependence on the officer, making him or her an employer. In a trafficking case, one court examined the following factors to determine that corporate officer liability under the FLSA had been adequately pled:

> The significant ownership interest of the corporate officers; their operational control of significant aspects of the corporation's day to day functions, including compensation of employees; and the fact that they personally made decisions to continue operating the business despite financial adversity and the company's inability to fulfill its statutory obligations to its employees.[92]

Some courts also have found that an officer or director of a corporation can be found personally liable for torts he or she personally commits "irrespective of whether the corporation for which he was acting was a tort-feasor or not or whether the defendant was acting in its behalf as its agent."[93] The law in this respect, however, varies significantly between the states.

Absent individual liability as an employer for claims under the FLSA and some other labor laws, or in some states for torts he or she personally commits, it may still be possible to pierce the corporate veil. The standard for piercing the corporate veil will generally be based on state law.

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85 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *9-14 (D. Colo. Mar. 2, 2007).

86 *See, e.g., Reyes*, 495 F.3d 403, 406-410 (7th Cir. 2007); Charles v. Burton, 169 F.3d 1322, 1328-29 (11th Cir. 1999); Torres-Lopez v. May, 111 F.3d 633, 638-39 (9th Cir. 1997); Antenor v. D & S Farms, 88 F.3d 925, 937 (11th Cir. 1996); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 238 (5th Cir. 1973); Luna v. Del Monte Fresh Produce (Southeast), Case No. 06-CV-2000, 2008 U.S. Dist. LEXIS 21636, *9-20 (Mar. 18, 2008).

87 *See, e.g.,* Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (security guard); *Liu*, No. 00 Civ. 4221, 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. Dec. 22, 2000) (garment factory); Grochowski v. Ajet Constr. Corp., No. 97 Civ. 6269,1999 U.S. Dist. LEXIS 13473, at *6-9 (S.D.N.Y. Sept. 1, 1999) (roofers and bricklayers); Lopez v. Silverman, 14 F. Supp. 2d 405, 413-14 (S.D.N.Y. 1998) (garment factory); Bureerong v. Uvawas, 959 F. Supp. 1231, 1236 (C.D. Cal. 1997) (garment factory).

88 393 F. Supp. 2d 295, 325-331 (D.N.J. 2005).

89 959 F. Supp. at 1233.

90 For the purpose of this discussion, we use the term "corporation" broadly. Most states have created mechanisms for business entities to limit the liability of their principals outside of the corporate forum, such as limited liability companies (LLCs) or partnerships (LLPs or LPs). Generally, this analysis will apply to principals at any such entity. *See, e.g.,* MAG Portfolio Consult, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58, 63-65 (2d Cir. 2001) (applying New York corporate veil-piercing inquiry to LLCs).

91 Yang v. ACBL Corp., 427 F. Supp. 2d 327, 343 (S.D.N.Y. 2005).

92 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *8 (D. Colo. Mar. 2, 2007) (quoting Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 677-78 (1st Cir. 1998)) (these factors are not examined by courts in all circuits); *see also* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1281 (N.D. Okla. 2006).

93 *Id.* at 1293 (trafficking-related tort claims against corporate officer were "not merely an action to recover on a corporate debt.").

The standard in New York is similar to most other states, but you should, of course, look at your own state's law in this respect. New York courts disregard the corporate form and find liability against an individual "'when the corporation has been so dominated by an individual or another corporation ... and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.'"[94] In order to determine whether a corporation has been so dominated, courts consider a number of factors, including:

> The intermingling of corporate and personal funds, under-capitalization of the corporation, failure to observe corporate formalities, such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.[95]

Significantly, this doctrine allows the corporate veil to be pierced where the controlling individual so dominated the corporation as to have the power to stop the infringement of the plaintiffs' legal rights.[96]

In the context of federal labor laws, courts have adopted a standard that is even "more favorable to a party seeking to pierce the veil than the state law standard."[97] Under this broader federal standard, courts have weighed the following factors to determine whether the corporate veil should be pierced:

1) the amount of respect given by the shareholders to the separate identity of the corporation and to its formal administration,
2) the degree of injustice that recognition of the corporate form would visit upon the litigants,
3) the intent of the shareholders or incorporators to avoid civil or criminal liability,
4) inadequate corporate capitalization, and
5) whether the corporation is merely a sham.[98]

What to do When the Defendant Operates Multiple Corporations

Employers, and particularly those with questionable labor practices, may do business through multiple corporations. Often, some corporations will function solely as holding companies, which retain title to all or most of the employer's assets. The business owner may operate a separate corporation that nominally functions as the employer of his or her workers.

In the employment law context, courts examine whether multiple entities are so interrelated that they constitute a "single employer."[99] To determine this, Courts examine the following four factors:

1) interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2) common management, common directors and boards;
3) centralized control of labor relations and personnel; and
4) common ownership and financial control.

None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern.[100]

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94 Bridgestone Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 17-18 (2d Cir. 1996) (quoting Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979)).

95 *Id.* at 18.

96 *See* Allen v. New Image Indus., Inc., No. 97 Civ. 240, 1998 U.S. Dist. LEXIS 6564, at *5 (N.D.N.Y. May 5, 1998); Int'l Controls and Measurements Corp. v. Watsco, Inc., 853 F. 585, 590 (N.D.N.Y. 1994).

97 Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co., 210 F.3d 18, 25-26 (1st Cir. 2000); *see also* Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d Cir. 1987), *rev'd* on other grounds *sub nom In re* Masters Mates & Pilots Pension Plan and IRAP Litig., 957 F.2d 1020 (2d Cir. 1992).

98 Goldberg v. Colonial Metal Spinning and Stamping Co., Inc., No. 92 Civ. 3721, 1993 U.S. Dist LEXIS 12732, at *14-15 (S.D.N.Y. Sept. 2, 1993).

99 Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 993 (6th Cir. 1997); *see also Id.* at n.4 for a helpful discussion of the distinction between "joint employer" and "single employer" analysis.

100 *Id.* at 994 (internal citations omitted).

Outside of the employment law context, the analysis is very similar to the analysis required to determine whether the corporate veil can be pierced. Courts have determined that the corporations are alter egos of each other where they have "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership."[101]

Finally, some courts will extend liability to two or more businesses if they operate as a "joint venture."[102] A joint venture will be based on state law, and will generally require "(1) joint interest in a common business; (2) an understanding to share profits and losses; and (3) a right to joint control."[103]

C. Naming Different Defendants for Different Causes of Action

It is entirely appropriate to name some defendants in some counts and other defendants in other counts. For example, you may name the trafficker or the direct employer for the intentional tort allegations, and the manufacturer as a joint employer for some of the labor law violations. A good way to organize the complaint is to specify with each count which defendants are included, and to include topical headings in your factual allegations.

VI. WHEN TO INCLUDE A JURY DEMAND

The general rule is that plaintiffs prefer jury trials and defendants prefer bench trials. This is because juries award far greater damages on average than do judges. However, in trafficking cases, you should weigh the likelihood of greater damages against the potential risk of bringing your case before a jury. First and foremost, you should know your judge and know your jury pool. Consider who your client is and who the defendants will be in light of the politics of the court and the biases of the community.

VII. SERVICE OF PROCESS: SERVING A FOREIGN DEFENDANT OR A DEFENDANT YOU CANNOT FIND

In trafficking cases, it is very likely that some of the defendants will be difficult to serve. Federal Rule of Civil Procedure 4(e) allows for service upon an individual within a judicial district of the United States pursuant to the laws of the state in which the action is brought, or the state in which service came into effect. Therefore, if service by mail or personal service is not successful, many states allow for a "nail and mail" or "leave and mail" option. If these methods fail or are not available, you may petition the court for an alternative means of service, which must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[104] The most common form of alternative service is service by publication, which generally requires that you show that (1) service is otherwise impossible (or cannot be made with due diligence); (2) it is reasonable to conclude that the defendant is likely to read the newspaper in which notice is published; and (3) the defendant is otherwise on notice that there may be a case pending against him or her.[105] In the trafficking context, one court allowed service by publication based in part on a declaration of an INS Special Agent indicating that the defendant to be served had been indicted, but remained at large and was considered a fugitive.[106] These requirements,

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101 Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 748 (2d Cir. 1996) (internal citations omitted).

102 *See, e.g., Gap, Inc.*, 2001 WL 1842389 at *11 (trafficking case finding no joint venture between manufacturers and retailers) (citing Jackson v. East Bay Hosp., 246 F.3d 1248, 1261 (9th Cir. 2001) (also finding no joint venture)).

103 *Gap, Inc.*, 2001 WL 1842389 at *11.

104 S.E.C. v. Tome, 833 F.2d 1086, 1093 (2d Cir. 1987) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

105 *See, e.g.*, S.E.C. v. HGI, Inc., No. 99 Civ. 3866, 1999 U.S. Dist. LEXIS 17441, at *4 (S.D.N.Y. Nov. 5, 1999).

106 *See Javier H.*, 217 F.R.D. 308, 309 (W.D.N.Y. 2003).

however, will vary from state to state. State law will also govern the specific form of service by publication, so you will need to look this up in your jurisdiction.

A foreign defendant residing in a country that is a signatory to the Hague Convention on the Service Abroad of Judicial or Extrajudicial Documents may be served pursuant to that convention.[107] Where the Hague Convention does not apply, Fed. R. Civ. P. 4(f) sets forth alternative methods of service that may be available. The assistance of a foreign court in the service of process may also be requested through a letter rogatory,[108] though this process can be extremely slow and cumbersome.

107 *See* Fed. R. Civ. P. 4(f)(1). Information about the requirements of Hague convention can be downloaded or ordered from www.hcch.net. On request, author Werner can provide additional information regarding these requirements.

108 *See generally* 23 Am Jur 2d Depositions and Discovery § 17 (Issuance and enforcement of letter rogatory or request).

CHAPTER 3
CAUSES OF ACTION

The Trafficking Victims Protection Act of 2000 was enacted to comprehensively combat human trafficking in the United States by strengthening criminal laws against the traffickers while providing conditional protection and benefits to the victims. It was amended in December 2003 to include a private right of action. In addition to the trafficking civil claim, many other U.S. laws may provide civil remedies to trafficked persons. These laws, including federal and state labor and employment laws and tort laws related to forced labor conditions, are intended to protect all workers from exploitation.[1] Be sure to consult your state labor codes, constitution and other statutes for additional causes of action.

I. TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2003, 22 U.S.C. § 7101 (2004)

A. Civil Remedy for Violation of the TVPRA[2]

The TVPRA allows an individual who is a victim of a violation of sections 1589, 1590, or 1591 to bring a civil action against the alleged defendant in a district court to recover damages and reasonable attorneys fees.[3] Note that a civil action filed under section 1595 shall be stayed during the criminal action arising out of the same occurrence.[4] A section 1595 claim may be made even in the absence of a criminal investigation or prosecution.

B. Background

The TVPRA provides private rights of action for the trafficking crimes of forced labor, trafficking into servitude and sex trafficking. The TVPRA also makes human trafficking crimes predicate offenses for RICO charges and adds, "trafficking in persons" to the definition of racketeering activity. Please refer to the RICO section of this manual for more information on bringing RICO civil claims.

Since the enactment of the TVPRA, over twenty civil lawsuits have been filed utilizing this cause of action. Many of these cases have settled without trial, and some are still pending. Among the pending cases, some have been stayed by law enforcement pursuing criminal prosecutions. Other pending cases are in discovery. Finally, a few cases have not succeeded in challenging motions to dismiss the TVPRA claim, but have moved forward on other claims.

C. Making a Claim

In order to bring a viable claim under section 1595, the plaintiff must be a victim of one of three specified trafficking crimes: forced labor, trafficking into servitude, or sex trafficking.

Forced Labor

Whoever knowingly provides or obtains the labor or services of a person:

1) by threats of serious harm to, or physical restraint against, that person or another person;

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1 *See generally* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L.J. 1 (2004) (providing further analysis of the trafficking private right of action and other causes of action utilized in trafficking civil suits).

2 18 U.S.C. § 1595 (2008).

3 18 U.S.C. § 1595(a).

4 18 U.S.C. § 1595(b)(1). *See also* Chapter 1, § III(C), *supra*.

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 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 ...[5]

Trafficking into Servitude

"Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter ...[6]

Sex Trafficking of Children or by Force, Fraud, or Coercion

Whoever knowingly — (1) in or affecting interstate or foreign commerce ... 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 ... knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act ...[7]

It should be noted that although section 1595 specifies violations of sections 1589, 1590, and 1591 as grounds for civil relief, section 1590 itself is in fact a catchall provision, incorporating all the trafficking-related violations enacted by the TVPA. The "in violation of this chapter" reference in the language of section 1590 pulls in all of Chapter 77, Title 18 of the U.S. Code ("Chapter 77"). Therefore, section 1590 appears to offer a private right of action for each and every provision of 18 U.S.C. §§ 1581 – 1594, so long as the defendant "recruits, harbors, transports, provides, or obtains" the victim. This raises a number of possible additional claims. For example, a defendant knowingly involved in the recruitment, harboring, or transporting of individuals for the purpose of placing them in forced labor or involuntary servitude could be liable under this section even if the individuals never ended up in a forced labor situation. It also arguably provides a private right of action for document theft under section 1592, or even attempt under section 1594(a). This strategy should be distinguished from the plaintiff's litigation strategy in *Cruz v. Toliver*,[8] where the court failed to find independent causes of action for sections 1581 and 1592.

The plaintiff in *Cruz* did not cross-reference to violations of sections 1581 and 1592 through a section 1590 claim. Instead, the plaintiff brought sections 1581 and 1592 claims as distinctly separate causes of action that were pled in addition to claims brought pursuant to sections 1589 and 1590. The court dismissed the sections 1581 and 1592 claims as independent causes of action. In an unpublished opinion from the Western District Court of Kentucky, the court cited *Gozlon-Peretz v. United States*,[9] to conclude that, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." The Kentucky court reasoned that the TVPRA specifically provided for private causes of action under sections 1589, 1590, and 1591, but omitted private causes of action for sections 1581 and 1592. Therefore, the court argued that if it had been the intent of Congress to include private causes of action for sections 1581 and 1592, it would have explicitly done so in section 1595. The court also cited older cases in other jurisdictions, which denied implied rights of action for section 1581.[10]

However, the court's conclusion in *Cruz* should not discourage litigators from bringing claims based on additional Chapter 77 violations that would be incorporated through the section 1590 "catch-all" provision. Again,

5 18 U.S.C. § 1589 (2008).
6 18 U.S.C. § 1590.
7 18 U.S.C. § 1591.
8 *See* No. 04 Civ. 231-R, 2007 U.S. Dist. Lexis 24468 at *2 (W.D. Ky. March 30, 2007).
9 498 U.S. 395, 404 (1991)
10 Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1227 (W.D. Okla. 1997) (denying a private cause of action for section 1581); Dolla v. Unicast Co., 930 F. Supp. 202, 205 (E.D. Pa. 1996) (same).

violation of section 1590 is specified in section 1595 as a ground for civil relief. Therefore, had the plaintiff cross-referenced to sections 1581 and 1592 within her section 1590 claim, the court would not have been able to dismiss the sections 1581 and 1592 claims based on statutory interpretation.

D. Scope of "Coercion"[11]

Perhaps most controversial in the interpretation and application of the TVPRA is the meaning of "coercion" and "serious harm," as intended by Congress in drafting the original TVPA. Guidance on the scope of these terms can be found from two sources. First, federal court opinions in criminal trafficking cases have interpreted the definitional scope of "coercion" and "serious harm" to establish violations of sections 1589, 1590, and 1591. Second, the TVPA itself and its congressional conference report elaborate on the intended meanings of "coercion" and "serious harm" for purposes of enforcement and adjudication.

Court Opinions

U.S. v. Calimlim[12]

In this case, a Philippine woman was forced to work as a domestic servant for a couple in Wisconsin for nineteen years. The Defendants kept the victim's passport, withheld information from her about opportunities to regularize her immigration status, and made vague threats that she might be subject to arrest, imprisonment, or deportation if she was discovered.[13] After the trial, the jury convicted the Defendants of violating the forced labor prohibitions of 18 U.S.C. § 1589(b) and (c), as well as other crimes. On appeal, the Defendants argued, *inter alia*, that the phrases "serious harm" and "threatened abuse of the legal process" in section 1589 were too vague and overbroad to pass constitutional muster. The Seventh Circuit rejected this argument and upheld the convictions. After a detailed examination of allegations against the Defendants, the court concluded that the Defendants' actions "could reasonably be viewed as a scheme to make [the victim] believe that she or her family would be harmed if she tried to leave. This is all the jury needed to convict."[14] Significantly, the court noted that:

> [W]ith reference to § 1589, after the Supreme Court ruled that a similar statute involving involuntary servitude, 18 U.S.C. § 1584, prohibited only servitude procured by threats of physical harm, ... Congress enacted § 1589. ... The language of § 1589 covers nonviolent coercion, and that is what the indictment accused the [Defendants] of doing; there was nothing arbitrary in applying the statute that way.[15]

U.S. v. Bradley[16]

U.S. v. Bradley involved workers from Jamaica trafficked to New Hampshire and forced to labor on a tree farm. A federal prosecution rendered guilty verdicts against each of the defendants for violation of section 1589, the forced labor provision of the TVPA. The defendants appealed the verdict, arguing that "forced labor" required evidence of physical force and could not be based on non-physical coercion. The First Circuit rejected the defendants' argument and affirmed the lower court's ruling. The *Bradley* court made clear that the TVPA was intended to encompass "subtle psychologi-

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11 This section is adapted from Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting U.S. v. Kozminski and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941 (2007).

12 538 F.3d 706 (7th Cir. Aug. 15, 2008).

13 *Id.* at 709 and 713.

14 *Id.* at 713.

15 *Id.* at 712 (internal citations omitted). This conclusion is repeated later in the decision. *Id.* at 714.

16 390 F.3d 145 (1st Cir. 2004).

cal methods of coercion."[17] The court also stated that determining the sufficiency of coercion to evidence a forced labor violation required consideration of a worker's "special vulnerabilities."[18]

U.S. v. Garcia[19]

Section 1589 of the TVPA survived a 2003 challenge in a federal district court that it was unconstitutionally "void for vagueness." In *U.S. v. Garcia*,[20] the government indicted various farm labor contractors for trafficking Mexican farm laborers to New York State and forcing them to work under threats of violence and deportation. The defendants sought to dismiss the forced labor charges against them, arguing that the TVPA's undefined nature—specifically, the terms "obtains," "threats of serious harm" and "abuse or threatened abuse of law," made it impermissibly vague.[21] The *Garcia* court rejected the claim, declaring that the statute provided the guidance necessary to overcome the vagueness challenge.[22]

Congressional Record

The TVPA's Purpose and Findings explicitly proclaims that crimes of involuntary servitude include those perpetrated through psychological abuse and nonviolent coercion: "Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion."[23] Thus, the TVPA supersedes the restrictive definition set forth in *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court case that narrowly interpreted the definition of involuntary servitude as servitude that is brought about through the use or threatened use of physical or legal coercion. The TVPA's legislative conference report emphasized the Act's intent to "provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."[24]

With the objective to expand the legal meaning of involuntary servitude to address human trafficking, the TVPA's new criminal codes are based upon a broadened version of coercion.[25]

The TVPA defines coercion as:

A) threats of serious harm to or physical restraint against any person;
B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
C) the abuse or threatened abuse of the legal process.[26]

The Act further declares that, "statutes on involuntary servitude have been narrowly construed, in the absence of a definition by Congress, to exclude certain cases in which persons are held in a condition of servitude by nonviolent coercion."[27] Thus, the TVPA incorporates its description of coercion into a new definition of involuntary servitude.

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17 390 F.3d at 150-51 (discussing various interpretations of coercion under the Act).

18 *Id.* at 152-53.

19 No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. Dec. 2, 2003).

20 *Id.* at *1-2.

21 *Id.* at *14-15, 17.

22 *Id.* at *17, 27. According to the court, section 1589, the forced labor statute enacted by the TVPA, was sufficiently definite on its face to provide fair notice to criminal defendants because it required scienter: "Since § 1589 only applies to a person who 'knowingly provides or obtains the labor or services of a person' ... the issue of notice is properly 'ameliorated.'" *Id.* at *18 (emphasis added). Additionally, the court stated that nothing in the statute encouraged indiscriminate over-enforcement by law officials: "There is nothing in § 1589 that would cause one to conclude that ...'it furnish[es] a ... tool for harsh and discriminatory enforcement ...'" *Id.* at *26 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

23 22 U.S.C. § 7101(b)(13).

24 H.R. Rep. No. 106-939, at 101 (2000).

25 *Id.*

26 22 U.S.C. § 7102(2) (2008).

27 H.R. Rep. No. 106-939, at 89 (2000).

The term involuntary servitude includes a condition of servitude induced by means of:

A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
B) the abuse or threatened abuse of the legal process.[28]

Finally, the new crime of forced labor, like the new definition of involuntary servitude, also incorporates the broadened meaning of coercion, officially expanding the forms of unfree labor prohibited pursuant to Congress' Thirteenth Amendment section 2 enforcement power.

Whoever knowingly provides or obtains 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 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 ...[29]

The accompanying legislative conference report instructs that Congress meant the above provisions to address the subtle methods that traffickers use to "place their victims in modern-day slavery."[30] Such subtle methods include threats to "harm ... third persons, restrain[ing] [the] victims without physical violence or injury, or [threats of] dire consequences by means other than overt violence."[31] "The term serious harm ... refers to a broad array of harms, including both physical and nonphysical."[32] Moreover, in addition to direct threats, traffickers may employ "a scheme, plan[,] or pattern," amounting to a subtler, but equally effective, form of coercion.[33] The TVPA explains that Congress intended the language of serious harm and scheme, plan, or pattern to assist prosecutors in proving forced labor violations in the absence of "physical harm or threats of force against victims."[34] Finally, in determining the degree of coercion that is criminally actionable, the TVPA instructs that courts must take into account the victim's individual circumstances, such as age and background.[35]

The TVPA's conference report illustrates subtle and non-physical methods of coercion with three examples.[36] In one scenario, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her to believe that "children in her care will be harmed if she leaves the home."[37] A trafficker subjects another worker to a "scheme, plan, or pattern" when the worker is caused to believe that "her family will face harms, such as banishment, starvation, or bankruptcy in their home country."[38] In a third example, individuals traffic children into forced labor by means of "nonviolent and psychological coercion" including "isolation, denial of sleep, and other punishments."[39]

28 22 U.S.C. § 7102(5).
29 18 U.S.C. § 1589.
30 H.R. Rep. No. 106-939, at 101 (2000).
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*

E. Application of the TVPRA to Trafficking Outside the United States

The extraterritorial reach of the TVPRA was considered by the Southern District of Indiana in *Roe v. Bridgestone Corp*.[40] In that case, plaintiffs were workers in a rubber plantation in the West African country of Liberia, who brought suit for forced labor against Bridgestone and Firestone corporations and holdings. Among other claims, plaintiffs alleged violation of section 1589 and sought relief pursuant to section 1595. The defendants sought to dismiss the claim arguing that even if the conditions on the plantation in Liberia amounted to forced labor, section 1589 did not apply to labor conditions outside the United States. Finding no previous case law on the issue, the court concluded that "[s]ection 1595 [did] not provide a remedy for alleged violations of section 1589's standards that occur outside the United States."[41]

The court relied on the general presumption derived from Supreme Court precedent that "[u]nless a contrary intent appears, [congressional legislation] is meant to apply only within the territorial jurisdiction of the United States."[42] The court noted, however, one Supreme Court case that departed from this general presumption due to the "nature of the crime" legislated, as well as indications of congressional intent that inferred extraterritorial application of the statute in question.[43] Despite plaintiff's arguments that trafficking was international in dimension and that the TVPA contemplated enforcement of trafficking violations overseas, the *Bridgestone* court refused to extend section 1589 to the conditions at the Liberian plantation. The court recognized the international nature of trafficking, but contended that unless made explicit, section 1589 must be presumed to apply domestically: "The other closely related statutes addressing slavery and related practices in Chapter 77 of Title 18 show that Congress has been acquainted with the question of international reach in this context for more than 200 years. Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so."[44] Thus, the plaintiff's TVPRA claim in this case did not survive the motion to dismiss.

More recently, the U.S. District Court for the District of Columbia reached a similar conclusion, referencing the *Bridgestone* decision.[45]

Despite these court opinions, the extraterritorial implementation of the TVPRA remains a viable option for attorneys representing trafficked clients in foreign countries. The TVPA's congressional record demonstrates a clear intent to execute anti-trafficking strategies abroad. Moreover, neither the language of the TVPA nor the TVPRA explicitly precludes such claims.

F. Pleading Requirements

Without making a definitive ruling on the question, one court strongly suggested that the heightened pleading requirements of Fed. R. Civ. P. 9 did not apply to claims brought under the TVPRA.[46]

G. Retroactive Applications

It should be noted that courts are unlikely to allow the new trafficking claim to be applied retroactively. There is a general presumption against retroactive application of legislation.[47] Principles of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

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40 492 F. Supp. 2d 988 (S.D. Ind. 2007).

41 *Id.* at 999.

42 *Id.* at 1000.

43 *Id.* at 1000 (citing United States v. Bowman, 260 U.S. 94, 98 (1922).

44 *Id.* at 1002.

45 *See* Natah v. Bush, 541 F. Supp. 2d 223, 234-35 (D.D.C. Mar. 31, 2008).

46 *See* Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *21 (D. Colo. Jan. 4, 2007).

47 *But cf.* United States v. Hudson, 299 U.S. 498, 500-01 (1937) (holding a retroactive provision in a tax statute valid because it had long been the practice of Congress to apply taxes retroactively for short periods in order to tax profits obtained while the legislation was in the process of enactment).

In *Landgraf v. USI Film Products*, the Supreme Court stated, "prospectivity remains the appropriate default rule."[48] The Court further states, "[o]ur statement in *Bowen* that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result' ..." was a step in a long line of cases barring retroactivity unless it was clearly intended by Congress.[49] Therefore, only clear congressional intent allowing retroactivity, established by explicit statutory language, will overcome the presumption of prospectivity.

Although the legislative history of the original TVPA from the year 2000 indicates that a private right of action was contemplated, this civil remedy was eliminated in the final version of the bill. The 2003 TVPRA's private right of action does not expressly provide for retroactive application. Of note, however, in two actions arising out of trafficking claims pre-dating the TVPRA, courts allowed the plaintiffs to merge the TVPA's expanded definition of coercion into their claims under the Alien Tort Claims Act.[50] Yet, in another case, the court denied retroactive application of the TVPRA to events that occurred before December 19, 2003.[51] Applying the *Landgraf* test and finding no congressional intent to allow for retroactive application, the court further reasoned that retroactive application would impermissibly subject the defendant to a new legal burden of monetary liability with respect to past events.[52]

H. Statute of Limitations

The TVPRA does not specify a statute of limitations for the private right of action. Current pending legislation reauthorizing the TVPA includes an amendment to codify a ten-year statute of limitations for section 1595.

I. Damages

The TVPRA civil remedy provides for damages and reasonable attorneys' fees.

II. IMPLIED RIGHTS OF ACTION UNDER THE THIRTEENTH AMENDMENT AND ITS ENABLING STATUTE[53]

A. Thirteenth Amendment of the U.S. Constitution

> Section 1. [Slavery prohibited.]
> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
>
> Section 2. [Power to enforce amendment.]
> "Congress shall have power to enforce this article by appropriate legislation."[54]

Sale into Involuntary Servitude

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an

48 Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

49 *Id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

50 *See* Doe I v. Reddy, No. 02 Civ. 05570, 2003 U.S. Dist. LEXIS 26120, at *13 n.2, *33 & n.4, *35-36 (N.D. Cal. Aug. 4, 2003); Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *13 (S.D.N.Y. Dec. 3, 2003). The Alien Tort Claims Act is discussed in § III, *infra*.

51 *See* Abraham v. Singh, Civ. No. 04-0044, slip op. at 13-17 (E.D. La. July 5, 2005) (available from author Werner upon request).

52 *Id.* at 16.

53 18 U.S.C. § 1584 (2008).

54 U.S. Const. amend. XIII, §§ 1-2.

attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.[55]

B. Background

The Thirteenth Amendment and its enabling statute, 18 U.S.C. § 1584, prohibit "involuntary servitude."[56] Unlike the Fourteenth Amendment, the Thirteenth Amendment and section 1584 apply to both state action and private conduct.[57]

Neither the Thirteenth Amendment nor section 1584 expressly provides a civil remedy for victims of involuntary servitude. However, section 1584's provision of a criminal penalty does not preclude implication of a private cause of action for civil damages.[58] A court may imply a private right of action where Congress intended to create one by implication.[59] Courts that have implied a cause of action have generally done so when "the statute in question ... prohibited certain conduct or created federal rights in favor of private parties."[60]

To date, the U.S. Supreme Court has yet to recognize a private cause of action for involuntary servitude under the Thirteenth Amendment.[61] Lower federal courts have been divided on the issue.[62] The Eastern District of New York in *Manliguez* recently found a private cause of action under section 1584 based on involuntary servitude, holding that the beneficiaries of section 1584's protection are victims of a constitutionally prohibited practice; the statute is rooted in the Thirteenth Amendment, which confers the federal right to be protected from involuntary servitude; and a private cause of action would be consistent with section 1584's legislative intent.[63] The *Manliguez* court noted that other circuits have declined to extend civil liability to cases under section 1584.[64] However, the *Manliguez* court differentiated these cases by noting that they involved claims that did not meet the definition of "involuntary servitude" established under *Kozminski*.[65] At least one court since *Manliguez*, however, has found there is no private right of action under the Thirteenth Amendment.[66]

Still, as set forth in Chapter 3, § I(C), *supra,* because of the broad language of section 1590, a plaintiff has a private right of action for involuntary servitude under section 1584 so long as the defendant recruited, harbored, transported, or provided the plaintiff for labor or services in violation of section 1584.[67] Of note as well, one court suggested that 42 U.S.C. § 1985(3)'s anti-conspiracy provisions provided for a private right of action under the Thirteenth Amendment and 18 U.S.C. § 1584.[68]

C. Making a Claim

To make a valid private right of action claim under section 1584 a plaintiff must demonstrate that defendant's actions fit the definition of "involuntary servitude." The U.S. Supreme Court in *Kozminski* has held that for

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55 18 U.S.C. § 1584.

56 Manliguez v. Joseph, 226 F. Supp. 2d 377, 383 (E.D.N.Y. 2002).

57 *Id.*

58 *Id.* at 383-84.

59 *Id.* at 384 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979)).

60 *Id.* (quoting 442 U.S. at 569).

61 *Manliguez*, 226 F. Supp. 2d at 384 n.7 (citing City of Memphis v. Greene, 451 U.S. 100, 125 (1981)).

62 *See id.* at 384 & n.8.

63 *Id.* at 384.

64 *Id.* at 384 n.8 (citing Buchanan v. City of Bolivar, 99 F.3d 1352, 1357 (6th Cir. 1996); Turner v. Unification Church, 473 F. Supp. 367, 375 (D.R.I. 1978)).

65 *Id.* at 384 n.8 (citing United States v. Kozminski, 487 U.S. 931, 952 (1988)); *see also Javier H.*, 239 F.R.D. 342, 346-47 (W.D.N.Y. 2006) (noting no potential obstacles to permitting filing of amended complaint alleging Thirteenth Amendment violations other than statute of limitations concerns).

66 *See Reddy*, 2003 U.S. Dist. LEXIS 26120, at *37-42 (does not reference the *Manliguez* decision); *see also Gap, Inc.*, 2001 WL 1842389 at *16-18 (pre-dating *Manliguez*, but with a detailed discussion denying private adjudication of Thirteenth Amendment protections).

67 *See* 18 U.S.C. § 1590.

68 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *13-14. The Plaintiff in this action did not raise claims under the TVPRA, although the forced labor continued until 2004. *See also* § IX, *infra*.

purposes of prosecution the term "involuntary servitude" means: "[a] condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[69] This definition includes all cases "in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion."[70] It should be noted, however, that evidence of other means of coercion, of poor working conditions, or of a victim's special vulnerabilities may be relevant in determining whether the physical or legal coercion or threats could have compelled the victim to serve.[71] Furthermore, evidence of other means of coercion or poor working conditions may be used to corroborate disputed evidence.[72]

The TVPA enacted an expanded definition of "involuntary servitude" that includes labor compelled by psychological coercion.[73] Therefore, trafficked plaintiffs pleading an implied cause of action under the Thirteenth Amendment and section 1584 should encourage courts to consider the TVPA's broader definition of "involuntary servitude."[74] The argument could be presented as follows:

In *Kozminski*, the U.S. Supreme Court expressly limited the definition of "involuntary servitude" to the activities the Court concluded Congress intended to prohibit when the Thirteenth Amendment was passed.[75] Because "involuntary servitude" was not otherwise defined by Congress, the Court felt that it should:

> Adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity. ... The purposes underlying the rule of lenity — to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts — are certainly served by its application in this case.[76]

Still the Court specified that its definition was only applicable "absent change by Congress."[77]

In passing the TVPA's broader definition of "involuntary servitude," Congress expressly found that:

> [I]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.[78]

By creating an expanded definition of involuntary servitude in 22 U.S.C. § 7102(5), Congress fully intended to answer the invitation of the *Kozminski* Court to do just that. Therefore, as a result of Congress's action, the

69 *Kozminski*, 487 U.S. at 952.

70 *Id.*

71 *Id.*

72 *Id.*

73 22 U.S.C. § 7102(5) (2008) (defining involuntary servitude as "a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process").

74 *See* Kim & Hreshchyshyn, *supra* note 143, at 35 (discussing the TVPA's broader definition of involuntary servitude, which includes psychological coercion).

75 *Kozminski*, 487 U.S. at 944-53.

76 *Id.* at 952 (internal citations omitted).

77 *Id.*

78 22 U.S.C. § 7101(b)(13).

Kozminski Court's restrictive interpretation of involuntary servitude under the Thirteenth Amendment and 18 U.S.C. § 1584 is probably no longer good law.[79]

D. Statute of Limitations

Plaintiffs bringing civil claims under section 1584 must also meet the appropriate statute of limitations. Though section 1584 does not specify a statute of limitations, the Supreme Court in *North Star Steel Co. v. Thomas*[80] directs courts to borrow from the most analogous state law in the absence of a federal statute of limitations: "A look at this Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims."[81] The state limitations period must not, however, "'frustrate or interfere with the implementation of national policies,' ... or be at odds with the purpose or operation of federal substantive law."[82] The applicable statute of limitations may vary from state to state. Complaints must be filed in as little as one year from the alleged violation.[83] However, in New York, the appropriate statute of limitations has been found to be three years, in part because the state recognized a federal interest in providing effective remedies to civil rights violations.[84]

E. State Anti-Trafficking Provisions

Background

Nearly half of the states in the United States have constitutional provisions prohibiting slavery and involuntary servitude. The states which include slavery and involuntary servitude provisions in their constitutions include: Alabama, Arkansas, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, and Wisconsin. These provisions do not explicitly provide for a private right of action.

In 2004, the USDOJ publicly encouraged states to enact state level anti-trafficking legislation. To guide state legislatures in drafting anti-trafficking measures, the USDOJ released model anti-trafficking criminal laws.[85] One after another, individual states began to develop and codify anti-trafficking legislation. State anti-trafficking legislation ranged from sparse, focusing only on anti-trafficking criminal provisions, to lengthy omnibus bills that included new trafficking crimes, as well as attendant social services and compensation to trafficking victims. To date, 34 states have enacted anti-trafficking legislation.[86]

State Anti-Trafficking Civil Remedies

Despite the national movement toward state anti-trafficking legislation, only one state, California, has enacted a state level trafficking private right of action. This was the result of strong advocacy efforts by the California Anti-Trafficking Initiative,[87] a coalition of non-governmental organizations that closely collaborated with

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79 *See Calimlim*, 538 F.3d at 712, 714; *Bradley* 390 F.3d at 156; *cf.* Garcia v. Audubon Cmtys. Mgmt., LLC, Case No. 08-1291, 2008 U.S. Dist. LEXIS 31221, *7-8 (E.D. La. Apr. 15, 2008) (adopting the TVPA's definition of "involuntary servitude" set forth in 22 U.S.C. § 7102(5), and finding that "there is sufficient evidence for a *prima facie* showing of 'Involuntary Servitude.'"); *but cf.* United States v. Djoumessi, 538 F.3d 547, 551 (6th Cir. 2008) (in upholding an involuntary servitude conviction, applying the *Kozminski* definition without discussing the TVPA's definition)..

80 515 U.S. 29 (1995).

81 *Id.* at 33.

82 *Id.* at 34 (quoting Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 (1983) (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)).

83 Cal. Civ. Proc. Code § 340 (West 2003). *See* Reese v. Wal-Mart Stores, Inc., 87 Cal. Rptr. 2d 346, 350 (Cal. Ct. App. 3d Dist. 1999) (affirming the trial court's ruling that the statute of limitations for violations of the Unruh Act in California is one year).

84 *See Javier H.*, 239 F.R.D. 342, 347 (W.D.N.Y. 2006); *Manliguez*, 226 F. Supp. 2d 377, 385-86 (E.D.N.Y. 2002) (citing Owens v. Okure, 488 U.S. 235, 249-50 (1989)).

85 Model State Anti-Trafficking Criminal Statute, www.usdoj.gov/crt/crim/model_state_law.pdf (last visited June 16, 2008).

86 *See* National Institute on State Policy on Trafficking of Women and Girls, Enacted Laws by State, www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm.

87 The California Anti-Trafficking Initiative was led by Asian Pacific Islander Legal Outreach, Coalition to Abolish Slavery and Trafficking and Lawyers' Committee for Civil Rights of San Francisco. For more information on the California TVPA, contact Kathleen Kim.

Assemblymember Sally Lieber, the principal author of the bill, to draft legislation primarily intended to broaden trafficked persons' rights and protections.[88]

California Trafficking Victims Protection Act

AB 22, the California Trafficking Victims Protection Act was signed into law by Governor Arnold Schwarzenegger on September 21, 2005.[89] In addition to criminalizing trafficking and providing a trafficking civil cause of action, AB 22 mandates that state and local law enforcement issue an Law Enforcement Agency Endorsement within 15 days of encountering a trafficking victim in order to expedite the provision of federally granted social services and immigration relief. AB 22 enacts a trafficking victim-caseworker "privilege" to protect communications between victims and their social services caseworkers from intrusive discovery. AB 22 also provides victims with state crime victim compensation funds and state health and human services.

The California trafficking private right of action was amended as section 52.5 of the Cal. Civil Code. Section 52.5 provides that a trafficking victim may bring a civil action for actual, compensatory and punitive damages, and injunctive relief. Among other things, section 52.5 also provides for treble damages, as well as attorney's fees, costs and expert witness fees to the prevailing plaintiff. Similar to the federal trafficking private right of action, section 52.5 also provides that a civil action "shall be stayed during the pendency" of a criminal investigation and prosecution arising out of the same set of circumstances.[90] Thus far, two civil lawsuits have been filed utilizing section 52.5. Both are pending at this time.

Making the Claim

In order to make a claim under section 52.5 of the Cal. Civil Code, a plaintiff must be trafficked as defined by section 236.1 of the Cal. Penal Code.[91]

Section 236.1 of the Cal. Penal Code defines trafficking as the unlawful deprivation or violation of liberty of another to maintain a felony violation or obtain forced labor or services.[92] "Unlawful deprivation" may be established by showing:

- Fraud, deceit, coercion, violence, menace, threat of unlawful injury to victim or another person, or circumstances where person receiving threat reasonably believes that person would carry out threat.
- Duress, which includes knowingly destroying, concealing, removing, confiscating, or possessing any purported passport or immigration document of victim.[93]

"Forced labor or services" is defined as labor or services performed or provided by a person obtained through force, fraud, coercion, or equivalent conduct that would "reasonably overbear the will of the person."[94]

Statute of Limitations

The statute of limitations for adult plaintiffs under section 52.5 of the Cal. Civil Code is five years from the date when the trafficked person was liberated from the trafficking situation. For trafficked minors, the statute of limitations is eight years from the date that the minor reaches majority age.[95]

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88 Assemblymember Sally Lieber, Press Release – AB 22: Rare Show of Unity: Law Enforcement Leaders Join with Activists for Civil Rights and Women's Rights to Announce Governor's Signature of Comprehensive Human Trafficking Bill, http://democrats.assembly.ca.gov/members/a22/Press/p222005018.htm (last visited June 16, 2008).

89 *Id.*

90 Cal. Civ. Code § 52.5(h) (2007).

91 Cal. Civ. Code § 52.5(a).

92 Cal. Penal Code § 236.1(a) (2007).

93 Cal. Penal Code § 236.1(d).

94 Cal. Penal Code § 236.1(e).

95 Cal. Civ. Code § 52.5(c).

The statute of limitations may be tolled due to a variety of circumstances including a trafficked individual's disability, minor status, lack of knowledge, psychological trauma, cultural or linguistic isolation, inability to access victim services as well as threatening conduct from a defendant preventing a trafficked individual from bringing a civil action.[96]

Restitution

Section 52.5 provides that restitution paid by the defendant to the trafficked plaintiff should be credited toward any judgment or award resulting from a section 52.5 action.[97]

Restitution is granted pursuant to Cal. Penal Code § 1202.4(q), which was also enacted with the passage of AB 22. A convicted trafficker must pay two types of restitution: a fine that goes into the California State treasury as part of a general fund to compensate crime victims, and restitution paid directly to the particular victims of his or her particular crime.[98]

A court must order restitution to the trafficking victim according to the greater of the following:

1) the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred;
2) the value of the victim's labor as guaranteed under California law; or
3) the actual income derived by defendant from the victim's labor or services; or
4) any other appropriate means to provide reparations to the victim.[99]

The first three elements of the list provide baseline formulas to ensure that the victim receives some amount of monetary relief for the exploited labor. However, because the baseline formulas are generally insufficient to calculate the totality of the harm suffered by a trafficking victim, restitution includes other appropriate means for providing reparations to the victim. This provision should be construed broadly to give it its intended effect. Important considerations in these cases might include:

- Future medical and mental health related expenses
- Future lost wages
- Difficulties in procuring and maintaining employment
- Pain and suffering
- Loss of enjoyment of life

III. THE ALIEN TORT CLAIMS ACT[100]

The Alien Tort Claims Act ("ATCA") grants federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[101]

A. Background

The statute was enacted in 1789 by the first Congress, but was rarely invoked for almost 200 years. It has reemerged in more recent years as the primary civil litigation tool for addressing human rights abuses.[102] In a recent court decision, the Supreme Court upheld ATCA jurisdiction and conferred a cause of action for a

96 Cal. Civ. Code § 52.5(d-e).
97 Cal. Civ. Code § 52.5(g).
98 Cal. Penal Code § 1202.4(a)(3); § 1202.4(e, q).
99 Cal. Penal Code § 1202.4(q) (emphasis added).
100 28 U.S.C. § 1350 (2008).
101 *Id.*
102 *See* Kim & Hreshchyshyn, *supra* note 143, at 29-34 (discussing the application of ATCA in trafficking civil suits).

narrow class of torts.[103] Additionally, several federal appeals courts have upheld ATCA jurisdiction based on violations on a variety of human rights norms.[104] Still, ATCA litigation has ensued with much judicial scrutiny and the role of courts in adjudicating and enforcing international law continues to be contested.

Filartiga v. Pena-Irala[105]

This landmark decision determined by the Second Circuit marked the first modern case in which a court upheld ATCA jurisdiction for a suit between non-U.S. citizens for violations of the "laws of nations." The *Filartiga* court upheld jurisdiction pursuant to the ATCA over a claim by one Paraguayan citizen against another for causing the wrongful death of the former's son by torture. The court determined that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[106]

The *Filartiga* decision has lifted the two-hundred year old ATCA from obscurity and has given optimism to foreign plaintiffs trying to acquire jurisdiction in federal courts in the United States for cases alleging human rights abuses both here and abroad.

Kadic v. Karadzic[107]

In *Kadic*, the United States Court of Appeals for the Second Circuit held that alien plaintiffs could bring a claim against Radovan Karadzic, a Bosnian-Serb leader. The allegations pertained to certain tortuous acts, which violated international law and were committed in Bosnia-Herzegovina by forces under Karadzic's authority. The Second Circuit broadened ATCA jurisdiction for a range of human rights violations occurring abroad committed by non-state actors, including rape, torture, genocide, slavery and slave trade, and other war crimes by a Serbian military. Most importantly, the decision solidified the view that ATCA claims can be brought against non-state actors who commit atrocities in pursuit of genocide and war crimes, or who act under color of law.

John Doe I v. Unocal Corp.[108]

This case was brought against Unocal Corporation by forced laborers in Burma. Originally the court dismissed this case,[109] but the plaintiffs — building on the *Kadic* decision — persuaded the Ninth Circuit to reinstate a suit against Unocal for forced labor, rape, and extrajudicial killing that took place in Myanmar. Unocal did not act under color of state law, but the corporation ostensibly supplied "assistance" or "encouragement" to the offending government actors.[110] The case was reargued in July 2003 before an en banc panel of the Ninth Circuit. The court in this case had the capability of handing down a monumental decision by ruling in favor of the plaintiffs. However, the parties reached a confidential settlement in principle in December 2004.[111] *Unocal* would have been the first case in which an American-based corporation stood trial in federal court because of jurisdiction predicated on ATCA for suspected violations of international law.

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103 Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).

104 The Court, however, has passed on a number of opportunities to grant certiorari in ATCA cases. *See, e.g.*, Royal Dutch Petroleum Co. v. Wiwa, 532 U.S. 941 (2001); Kadic v. Karadzic, 518 U.S. 1005 (1996); Estate of Marcos v. Hilao, 513 U.S. 1126 (1995); Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985).

105 630 F.2d 876 (2d Cir. 1980).

106 *Id.* at 878.

107 70 F.3d 232 (2d Cir. 1995).

108 395 F.3d 932 (9th Cir. 2002).

109 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

110 395 F.3d 932, 947.

111 Press Release, EarthRights International, Settlement in Principle Reached in Unocal Case (Dec. 13, 2004), *at* www.earthrights.org/legalpr/settlement_in_principle_reached_in_unocal_case.htm; *see also* Duncan Campbell, *Energy Giant Agrees Settlement With Burmese Villagers*, The Guardian, Dec. 15, 2004, *at* www.guardian.co.uk/print/0,3858,5085841-103681,00.html.

Sosa v. Alvarez-Machain[112]

The Supreme Court in *Alvarez* recognized ATCA jurisdiction and a cause of action for a narrow class of torts. In *Alvarez*, the Court rejected an ATCA cause of action on behalf of a Mexican national who was arbitrarily arrested and kidnapped by another Mexican national collaborating with U.S. federal agents. The Court reasoned that "arbitrary arrest" did not rise to the level of an international norm that created legal obligations enforceable by federal courts. The Court reiterated vague language that an ATCA cause of action could only be brought for a "modest number of international law violations" that must be specific and definite. In determining whether an international norm is sufficiently definite to support a cause of action, courts must consider the "practical consequences" on foreign policy of allowing plaintiffs to bring the action in U.S. courts.[113] The Court also emphasized Congress' sole role in creating private rights and that Congress has never "affirmatively encouraged greater judicial creativity" regarding ATCA jurisprudence.[114]

The Court's opinion has the unique effect of bolstering an ATCA claim based on trafficking now that the TVPRA has been passed. With the TVPRA, Congress has expressed clear intent to provide a private right of action for trafficking. Thus, the availability of an ATCA claim for trafficked persons does not run the risk of creating "new rights," which the *Alvarez* Court cautioned against. Continued use of ATCA will contribute to the development of ATCA case law recognizing forced labor and other slave-like practices as binding international legal norms; it will emphasize the importance of enforcing these international norms in domestic courts.

Khulumani v. Barclay Nat'l Bank Ltd.[115]

In this recent decision, the Second Circuit allowed an ATCA case to proceed against 50 corporate defendants and hundreds of corporate "Doe" defendants who "actively and willingly collaborated with the government of South Africa in maintaining ... apartheid."[116] Significantly, this decision found that aiding and abetting violations of customary international law could provide a basis for ATCA jurisdiction.[117]

B. Making a Claim

In order to establish subject matter jurisdiction under the ATCA, a plaintiff must show that defendant violated a "specific, universal and obligatory" norm of international law.[118] Courts have held that the following claims satisfy this standard: torture; forced labor; slavery; prolonged arbitrary detention; crimes against humanity; genocide; disappearance; extrajudicial killing; violence against women; and cruel, inhuman, or degrading treatment.[119] However, a number of other serious violations have not met the standard, including forced transborder abduction involving a one-day detention prior to transfer of custody to government authorities.[120]

Plaintiffs hoping to establish subject matter jurisdiction based on other norms of international law must show widespread acceptance of the norm by the community of nations. Such acceptance may be demonstrated by

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112 542 U.S. 692 (2004).

113 *Id.* at 732.

114 *Id.* at 728. A number of courts have since rejected ATCA claims based on the *Alvarez* Court's reasoning. *See, e.g.*, De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008) (failure to inform detainee that he had the right to contact his nation's consulate); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (agent orange was only secondarily, and not intentionally, harmful to humans and therefore manufacturers did not violate international norms); Taveras v. Taveraz, 477 F.3d 767 (6th Cir. Ohio 2007) (international child abduction did not give rise to ATCA claim).

115 504 F.3d 254 (2d Cir. 2007).

116 *Id.* at 258.

117 *Id.* at 260.

118 Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

119 Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (slavery, genocide, extrajudicial killing, torture); *Kadic*, 70 F.3d 232, 236, 244 (2d Cir. 1995) (genocide, war crimes, crimes against humanity); Forti v. Suarez Mason, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) [Forti II] (disappearance); Forti v. Suarez Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) [Forti I] (prolonged arbitrary detention, summary execution); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (torture).

120 *Alvarez*, 542 U.S. at 738.

reference to state practice, international treaties, the decisions of international tribunals, and the writings of international law scholars.[121]

It should be noted, though, that since international law traditionally applied only to states, there are some restrictions regarding ATCA jurisdiction in cases brought against private individuals or corporations. In such cases, the rule of international law will apply in two contexts: (1) where the rule of international law includes in its definition culpability for private individuals; or (2) where the private actor acted "under color of law."[122]

First, the ATCA applies to private actors who violate the limited category of international law violations that do not require state action. These limited violations of customary international law are known as jus cogens norms, "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."[123] To date, courts have held this category to include war crimes, genocide, piracy, and slavery. Courts have also held that international law is violated where a private individual commits wrongs, such as rape, torture, or murder in pursuit of genocide, slavery, or violations of the laws of war.

Second, a private individual or entity may also be sued under the ATCA by acting "under color of law" in committing violations of international law norms that only apply to states. In applying this rule, courts have looked to standards developed under 42 U.S.C. § 1983 in suits seeking to redress violations of rights protected by the U.S. Constitution. In general, a defendant has acted under "color of law" where he or she acted together with state officials or with state aid.[124]

The ATCA not only creates subject matter jurisdiction for violations of international law, but also provides a cause of action.[125] Once a plaintiff successfully pleads a valid international law violation under the ATCA, he or she may then proceed to prove his or her case based on the relevant definition under international law. Where international law does not provide the relevant rules of decision, courts have at various times applied domestic federal common law and statutory law including the TVPA, state law, or the law of the foreign nation in which the tort was committed.

In *Reddy,*[126] the court provides a helpful review of the applicability of the ATCA to human trafficking inside the United States.

In *Bridgestone*,[127] the Southern District of Indiana rejected an ATCA claim based on forced labor brought by plaintiffs who were workers on a rubber plantation in Liberia. The court agreed that a valid ATCA claim could be based on the international law violation of forced labor. However, the court concluded that the working conditions of the plaintiffs in *Bridgestone* did not meet the standard of forced labor as understood under international law. The *Bridgestone* court took a rather restrictive view on the types of conditions that amounted to forced labor. According to the court, the *Bridgestone* plaintiffs could not show that they were forced to work under "menace of penalty." The court elaborated that the *Bridgestone* plaintiffs were not actually physically confined at the work premises nor did they suffer any direct threats of non-economic harm "deliberately inflicted" to compel them to work. Thus, the court concluded that the unfortunate economic

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121 For international sources giving substance to forced labor as a violation of international legal norm, please refer to the ATCA appendix.

122 *See Kadic*, 70 F.3d at 239-42, 243-44.

123 Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (citing the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332).

124 *See Kadic*, 70 F.3d at 245.

125 Flores v. S. Peru Copper Corp., 343 F.3d 140, 153-54 (2d Cir. 2003); Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996); *Hilao*, 25 F.3d at 1475. *See also Alvarez*, 542 U.S. at 724-25.

126 2003 U.S. Dist. LEXIS 26120 at *31-37. "[A]ssertions explaining that plaintiffs were brought to the United States and forced to work involuntarily and how defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions" are sufficient to state a claim under the ATCA for forced labor, debt bondage, and trafficking. *Id.* at *36.

127 492 F. Supp. 2d 988 (S.D. Ind. June 26, 2007).

circumstances of the workers and their inability to choose better employment could not provide the bases for an ATCA forced labor cause of action.[128]

C. Statute of Limitations

The text of the ATCA does not specify a statute of limitations. However, in *Papa v. United States*, the Ninth Circuit found that the 10-year statute of limitations of the Torture Victims Protection Act applies to ATCA claims.[129] In the *Javier H.* human trafficking litigation, the Court also found that "It is well-established that the ten-year statute of limitations of the [Torture Victims Protection Act] applies to [the ATCA]."[130] Further, the statute of limitations may be equitably tolled while the victim is unable to bring his or her claim.[131]

D. Damages

While courts are not consistent in the method by which they determine the scope of damages, they have been consistent in allowing victims to receive both compensatory and punitive damages for infringement of the ATCA.[132]

IV. FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT[133]

The Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") extends civil liability to any person, as defined in the act, who:

A) ... receive[s] any income derived ... from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal ... to use or invest ... any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;[134] and/or

B) through a pattern of racketeering activity or through collection of an unlawful debt [acquires or maintains]... any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce;[135] and/or

C) [is] employed by or associated with any enterprise engaged in ... interstate or foreign commerce [and] conduct[s] or participate[s] ... in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt;[136] and/or

D) conspire[s] to violate any of [these provisions].[137]

A. Background

Congress passed RICO in 1970 as part of the Organized Crime Control Act, aimed at strengthening legal mechanisms for combating organized crime. In particular, it broadened civil and criminal remedies and created evidentiary rules tailored to admitting evidence of organized crime.

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128 *Id.* at 1018-19.

129 281 F.3d 1004, 1011-12 (9th Cir. 2002). *See also Manliguez*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002).

130 *Javier H.*, 239 F.R.D. 342, 346 (W.D.N.Y. 2006).

131 *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1265 (11th Cir. Fla. 2006).

132 *See* Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (awarding punitive damages in the amount of $4 million for torture and false imprisonment to Haitian citizens opposing the former Haitian military rule); *see also Filartiga*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984) (awarding plaintiffs $10 million in compensatory and punitive damages for the torture and murder of a seventeen-year-old member of their family).

133 18 U.S.C. §§ 1960-1968 (2008).

134 *Id.* at § 1962(a).

135 *Id.* at § 1962(b).

136 *Id.* at § 1962(c).

137 *Id.* at § 1962(d).

B. Making a Claim

A successful RICO civil claim must be based on a "pattern" of "racketeering activity." "Racketeering activity" is defined as behavior that violates certain other laws, either enumerated federal statutes or state laws addressing specified topics and bearing specified penalties. "Pattern" requires at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity.[138]

The TVPRA adds human trafficking crimes as predicate offenses for RICO charges and "trafficking in persons" is now included in the definition of a racketeering activity.[139]

Other racketeering activities that qualify as criminal predicate acts for bringing a civil RICO claim in the trafficking context include:

- Mail and wire fraud
- Fraud in connection with identification documents
- Forgery or false use of passport
- Fraud and misuse of visas, permits, and other documents
- Peonage and slavery
- Activities prohibited under the Mann Act
- Importation of an alien for immoral use[140]
- Extortion (i.e., an employer threatening deportation when an employee complains about minimum wage or overtime amounts to unlawful extortion of employee's property interest in minimum wage or overtime)[141]

Keep in mind, though, that fraud claims — including predicate act fraud claims under the RICO — are not subject to the liberal notice pleading requirements of the federal rules. Rather, they must be pled with particularity in your Complaint.[142] Still, the elements of fraud that must be pled are different from common law fraud. In a recent decision clarifying the burden of proof for civil RICO mail fraud claims, the U.S. Supreme Court held that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations."[143] This is a significantly lighter burden than most state fraud or intentional misrepresentation claims, and may have significant implications for cases where, for example, a trafficker defrauded immigration authorities to obtain a visa for a victim and this fraud proximately causes the victim's injuries.

Many federal courts also require the filing of a detailed RICO case statement shortly after the civil RICO claims are first alleged in the pleadings.

The RICO also requires the existence of an "enterprise" through which the defendant engages in racketeering activities.[144]

An "association of fact" RICO enterprise is most common.[145] It has two key requirements:

- The defendant "person" must be separate from the "enterprise."[146]

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138 *Id.* at § 1961(5).

139 *Id.* at § 1961(1)(B).

140 *Id.* at § 1961(1)(A-C).

141 Violation of state theft or extortion criminal laws is a RICO predicate act. *Id.* at § 1961(1)(A). Practitioners should consult their state's laws on this issue.

142 *See* Fed. R. Civ. P. 9(b); Giuliano v. Fulton, 399 F.3d 381, 388-89 (1st Cir. 2005); Catalan v. Vermillion Ranch Ltd. P'ship, No. 06 Civ. 1043, 2007 U.S. Dist. LEXIS 567, at *15-21 (D. Colo. Jan. 4, 2007); *but see* Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1050-51 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

143 Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. —, 128 S. Ct. 2131; 170 L. Ed. 2d 1012 (June 9, 2008).

144 18 U.S.C. § 1962(a-c).

145 *Id.* at § 1961(4).

146 *See* Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

- The "enterprise" must be a continuing unit and "separate and apart from the pattern of activity in which it engages."[147]

If you don't know which enterprise to plead, you should consider pleading several alternatively.[148]

C. Statute of Limitations

RICO does not specify a statute of limitations. However, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* the Supreme Court applied a four-year statute of limitations.[149] The Court adopted the four-year statute of limitations period from the civil remedies provision of the Clayton Anti-Trust Act[150] as applicable to all federal civil RICO claims.[151]

D. Damages

Plaintiffs in RICO civil actions are entitled to treble damages and recovery of reasonable attorney's fees and costs.[152] Other remedies include: "ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise."[153] Any person whose business or property has been damaged as the result of proscribed racketeering activities may file a suit in federal court.[154] The U.S. Supreme Court recently rejected RICO claims in two cases because the plaintiffs' injuries lacked direct relation to the alleged RICO violation necessary to satisfy the requirement of proximate causation.[155]

In a recent decision in a tobacco liability case, one court delicately addressed the question of whether a RICO defendant can be liable for personal injuries. In dicta, the court suggested that "[i]t is not clear that personal injury damages are not recoverable under the RICO. ... A prohibition on recovery for personal injuries would not be consonant with the statutory language ..."[156]

E. RICO Claims in the Human Trafficking Context

Six recent decisions from five cases addressed RICO claims brought by victims of human trafficking.[157]

Abraham v. Singh[158]

The plaintiffs in this case were H-2B visa holders from India who had paid a principal of the defendant corporation a recruitment fee between $7,000 and $20,000. When they arrived, their passports were confiscated, they were housed in poor conditions with little food, and they were threatened with punitive measures if they complained. The plaintiffs filed a lawsuit under four separate provisions of the RICO: section 1962(a), (b), (c),

147 United States v. Turkette, 452 U.S. 576, 583 (1981).

148 *See, e.g., Catalan*, 2007 U.S. Dist. LEXIS 567, at *15-16; *Gap, Inc.*, 2002 WL 1000068 at *3-4.

149 483 U.S. 143, 155 (1987).

150 15 U.S.C. § 15b (2008).

151 483 U.S. at 155.

152 18 U.S.C. § 1964(c) (2008).

153 *Id.* at § 1964(a).

154 *Id.* at § 1964(c).

155 *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Mohawk Indus. v. Williams, 547 U.S. 516 (2006) (per curiam) (judgment vacated in light of *Anza* decision).

156 Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1042 (E.D.N.Y. 2006); *but see* Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (personal injuries not compensable under RICO); Rylewicz v. Beaton Servs., Ltd., 888 F.2d 1175 (7th Cir. 1989) (same).

157 The authors provide details of these cases because they provide a helpful glimpse into the complexity of the RICO, and guidance as to how to wade through these complex issues. Of note, a seventh decision, *Javier H.*, 239 F.R.D. 342, 347-48 (W.D.N.Y. 2006), addresses civil RICO only to indicate that the four-year statute of limitations was equitably tolled for new RICO claims while discovery was stayed for the pendency of the criminal action.

158 480 F.3d 351 (5th Cir. 2007).

and (d). The U.S. District Court granted the defendants' Fed. R. Civ. P. 12(b)(6) motion, dismissing all of the plaintiffs' RICO claims.

Plaintiffs appealed to the Fifth Circuit, which reversed the district court in part. The circuit court found that the plaintiffs had adequately alleged a pattern of racketeering activity: "The Plaintiffs did not allege predicate acts 'extending over a few weeks or months and threatening no future criminal conduct.' ... Rather, they alleged that the Defendants engaged in at least a two-year scheme involving repeated international travel ..."[159] The Fifth Circuit upheld the dismissal of the section 1962(a)[160] and (b)[161] claims. However, the Fifth Circuit allowed the section 1962(c) claim to proceed. Plaintiffs had adequately claimed that the corporate principal who recruited them was a RICO person separate from the corporation, which was the RICO enterprise.[162] Similarly, the section 1962(d) claims survived, as "Plaintiffs specifically alleged that the Defendants entered into an agreement and that each agreed to commit at least two predicate acts of racketeering."[163]

Catalan v. Vermillion Ranch Ltd. P'ship[164]

In this case, the plaintiffs were Chilean cattle herders employed at the defendants' ranch with H-2A visas. Among other things, the defendants allegedly confiscated the plaintiffs' identity documents and held the plaintiffs in debt peonage, whereby at the end of each month the plaintiffs would owe more money to the defendants. The plaintiffs filed suit under the FLSA, the RICO (section 1962(c) and (d)), the TVPRA, and state law. The defendants filed a motion to dismiss several of the plaintiffs' claims, including the plaintiffs' civil RICO claims.

The court denied the defendants' motion to dismiss in all respects. With respect to the RICO claims, the plaintiffs had alternatively pled two different RICO enterprises — a wise approach where there is some uncertainty as to which enterprise satisfies the requirements of the RICO. The court found that the plaintiffs had adequately alleged an enterprise for both alternatives.[165] The court also found that the plaintiffs had presented the allegations "sounding in fraud" with sufficient particularity.[166] Still, the court leaves unresolved the question of whether RICO claims that do not sound of fraud must meet the heightened pleading requirements of Rule 9, indicating that the plaintiffs' allegations of the predicate acts of extortion and human trafficking meet either notice pleading or Rule 9 pleading requirements.[167]

Zavala v. Wal-Mart Stores, Inc.[168]

The facts underlying this lawsuit received much media attention in 2002 and 2003. According to the Complaint, the plaintiffs were undocumented immigrant janitorial workers nominally employed by contractors — and occasionally by Wal-Mart — to clean Wal-Mart stores throughout the United States for sub-lawful wages. Wal-Mart allegedly hid the workers from law enforcement, threatened the workers with deportation, and locked them into the stores for the duration of their shifts.[169] Plaintiffs filed a lawsuit alleging violations of the RICO, the FLSA, 42 U.S.C. § 1985, and common law. Defendants filed a motion to dismiss the entire Complaint.

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159 *Id.* at 356.

160 *Id.* at 357 ("conclusory allegations are insufficient to state a claim under § 1962(a).").

161 *Id.* (no causal connection shown between the injuries and the defendants' "acquisition or maintenance of an interest in the enterprise.").

162 *Id.*

163 *Id.*

164 No. 06 Civ. 01043, 2007 U.S. Dist. LEXIS 567, at *15-21 (D. Colo. Jan. 4, 2007).

165 *Id.* at *16.

166 *Id.* at *17-20.

167 *Id.* at *20-21.

168 393 F. Supp. 2d 295 (D.N.J. 2005).

169 *Id.* at 301.

The court granted the defendants' motion as to the RICO and section 1985 claims. As for the RICO claims, the court concluded that the plaintiffs had not alleged two underlying predicate acts.[170] In summary, the court conducted a detailed review of each alleged predicate act, and for each found at least one element that plaintiffs had failed to support in their complaint.[171] The RICO conspiracy claims under section 1962(d) also failed. The court found that the plaintiffs' allegation that Wal-Mart knew the plaintiffs were undocumented was not sufficient to show that Wal-Mart "agreed to the commission of the predicate acts or racketeering."[172] This should serve as a cautionary note to attorneys bringing civil RICO claims on behalf of victims of trafficking: in spite of liberal notice pleading requirements of the federal rules (with the exception of claims specified in Rule 9), courts may approach civil RICO claims with some skepticism. It may be better to "over-plead" the underlying facts, rather than risk dismissal.[173]

Doe I v. Reddy[174]

Like the *Abraham* case, these plaintiffs were also from India. They claimed:

> Defendants fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities, but then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physical beat them.[175]

The lawsuit alleged claims under the RICO, the FLSA, the ATCA, the Thirteenth Amendment, and state law. The defendants filed a motion to dismiss certain claims. The RICO portion of the resulting opinion is discussed here.

The Court allowed the RICO claims to proceed. In a very helpful description of the requirements of civil RICO in the context of a human trafficking case, the Court found that (1) the plaintiffs' claims for lost personal property and wages constituted an "injury to business or property" and "the fact that plaintiffs also allege personal injury as a result of defendants' racketeering actions does not extinguish plaintiffs' standing based on their economic loss alleged;"[176] (2) defendants' visa fraud conspiracy continuing from 1986 to 2000 was sufficient to show a "pattern of racketeering activity;"[177] (3) plaintiffs sufficiently pled an "association in fact" RICO enterprise that exists "separate and apart from the pattern of racketeering activities;"[178] (4) plaintiffs' "investment-injury" claims under section 1962(a) survived, as plaintiffs alleged that "defendants used the proceeds [from the racketeering activity] in order to make it more difficult for plaintiffs to assert their rights, to eliminate plaintiffs' alternatives and to secrecy of their scheme so the plaintiffs' rights would not be vindicated;"[179] (5) because plaintiffs alleged that the corporate defendants were alter egos of the individual defendants, the defendants were joint or single employers of the plaintiffs, and each defendant aided and abetted sexual abuse of the plaintiffs, the RICO conspiracy claims under section 1962(d) survived;[180] and finally (6) because plaintiffs were alleged to be "vulnerable and powerless" in the Complaint, the fact the plaintiffs may have known that they entered the United States illegally does not make plaintiffs "in equal fault" under the *in pan delicto* or unclean hands doctrine.[181]

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170 *Id.* at 303.
171 *Id.* at 305-16.
172 *Id.* at 316-17.
173 Plaintiffs' civil RICO claims were dismissed without prejudice, giving plaintiffs the opportunity to amend their complaint to remedy the deficiencies. *Id* at 303.
174 2003 U.S. Dist. LEXIS 26120, at *14-28.
175 *Id.* at *12.
176 *Id.* at *15.
177 *Id.* at *16-18.
178 *Id.* at *18-23 (conglomerate enterprise was alleged to operate restaurants, manage real estate, and perform computer work, which was distinct from the racketeering).
179 *Id.* at *23-25.
180 *Id.* at *25-26.
181 *Id.* at *26-28.

Doe(s) I v. Gap, Inc.[182]

Two decisions in this case emerging out of the plaintiffs' employment in the Northern Mariana Islands provide a detailed examination of the requirements of civil RICO, though neither provides a review of the factual allegations in the case. Both involve motions to dismiss complaints: the 2001 decision addressing the First Amended Complaint, and the 2002 decision addressing the Second Amended Complaint. The significant difference between the two complaints, and therefore between the two decisions, involves the pleading of the RICO allegations against the retailer.

The 2001 decision upheld section 1962(c) claims against the manufacturer, but dismissed these claims against the retailer, finding the "failure to act is not participation in the conduct of an enterprise," and "quality control monitoring is insufficient to give rise to the inference that the retailer defendants were directing the enterprise at some level through a pattern of racketeering activities."[183] The Court did, however, find that the plaintiffs had adequately alleged RICO conspiracy claims against the retailer defendant under section 1962(d).[184]

Conversely, the 2002 decision found that the plaintiffs had sufficiently modified the allegations in their Second Amended Complaint so as to adequately allege section 1962(c) claims against the retailer. The plaintiffs had alleged "affirmative action and participation by [all] defendants in the control and direction of the alleged enterprises."[185]

V. FAIR LABOR STANDARDS ACT[186]

The Fair Labor Standards Act ("FLSA") is designed to alleviate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[187] The minimum wage and maximum hour protections offered by the FLSA provide trafficked workers with compensatory damages as well as liquidated damages for the willful wage and hour violations that occur in the context of forced labor.

A. Substantive Protections

Minimum Wage

FLSA section 6(a) provides that:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates … except as otherwise provided in this section … not less than … $5.85 an hour beginning on the 60th day after the date of

182 2001 WL 1842389 (motion to dismiss 1st Am. Compl., hereinafter "2001 decision"), and 2002 WL 1000068 (motion to dismiss 2d Am. Compl., hereinafter "2002 decision"). These decisions are not published in any reporter, nor are they available on LEXIS.

183 2001 decision at *9-10. The Court also found that plaintiffs adequately alleged various "single retailer–single manufacturer" enterprises, but not an enterprise consisting of all retailer defendants and all manufacturer defendants, *see id.* at *3; lost wages, employer's overcharging for food and housing, and payment of recruitment fees constituted "injury to property," but "deposits" that may not be returned are not an injury to property, *see id.* at *4-5; investment injury under § 1962(a) was not sufficiently plead, *see id.* at *5-6; and Northern Mariana Island statutory offenses, peonage, and Hobbs Act were adequately plead as predicate acts, but involuntary servitude was not, *see id.* at *6-8.

184 *Id.* at *10.

185 2002 decision at *13. The Court's 2002 decision was otherwise consistent with its 2001 decision, summarized in n.314, *supra*, with several notable exceptions: the Court found the existence of *five* new RICO enterprises, *see id.* at *6-8; plaintiffs sufficiently alleged "investment injuries" under § 1962(a) so as to survive the motion to dismiss both the § 1962(a) case in principle and the § 1962(d) conspiracy to violate § 1962(a) claim, *see id.* at *10-12; and plaintiffs adequately alleged proximate cause between the defendants' acts and the § 1962(c) injury (this question was not addressed in the 2001 decision), *see id.* at *13-14.

186 Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2008).

187 *Id.* at § 202.

> enactment of the Fair Minimum Wage Act of 2007 [enacted May 25, 2007] ... $6.55 an hour, beginning 12 months after that 60th day ... $7.25 an hour, beginning 24 months after that 60th day.[188]

Any amount paid under minimum wage will suffice for a claim of unpaid wages under the FLSA. Trafficked workers are often paid far less than federal minimum wage or are not paid at all. If the state minimum wage standard is higher, the USDOL will calculate unpaid wages according to federal and state standards, and inform the employer of their obligation under both. However, the USDOL can *only* enforce requirements under the FLSA.[189] If your state minimum wage is higher, you should consider filing with your local labor commissioner or exercising your client's private right of action, if available. You may use the FLSA claim to attain federal court jurisdiction and include a supplemental state minimum wage claim. Keep in mind that, even if the state minimum wage is higher, the *liquidated damages* provision of the FLSA may result in higher overall damages for your client if your state law does not have a similar provision.

Maximum Hours and Overtime

FLSA section 7(a)(1) states that:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[190]

Trafficked workers are often forced to work far more than forty hours per week. Exceedingly high hours can amount to significant damages in unpaid overtime. Be aware that some states provide more overtime protections than given by the FLSA. For example, California increases the overtime rate to two times the minimum wage for a workday of over twelve hours.

B. Calculating Hours

Hours worked are defined as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place."[191] Trafficked workers may be required to be "on-call" 24 hours a day without breaks or uninterrupted sleeping time. This "on call" time may constitute compensable work time.[192]

The FLSA regulations provide guidelines for calculating hours worked and include specific interpretations for rest and meal breaks, sleep time and other periods of free time.[193] In general, if sleeping time, meal periods or other periods of free time is interrupted by a call to duty, the interruption must be counted as hours worked. The following is an overview of these guidelines. Please look to the regulations for more detailed information.

Breaks

Meal breaks where the employee is still required to work are compensable.[194] Break periods of less than twenty minutes are also compensable.[195]

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188 *Id.* at § 206(a) (2008).

189 *See id.* at § 216(c) (2008).

190 *See id.* at § 207(a)(1) (2008).

191 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91 (1946).

192 *See* 29 C.F.R. § 785.23 (2008). For domestic workers it can be argued that spending the night with a child is working because the worker's presence is comforting to the child. There are no reported decisions on this though.

193 *Id.* at § 785.1.

194 *Id.* at § 785.19(a).

195 *Id.* at § 785.18.

Sleep

For shifts shorter than 24 consecutive hours, all hours are compensable including time spent sleeping or engaging in personal activities, if the employee is on duty during that period.[196] For shifts longer than 24 hours, up to eight hours of sleep time may be excluded from compensable hours.[197] However, interrupted sleep time can be compensated for the length of the interruption; and if sleep time is interrupted to the point where the employee is denied a reasonable night's sleep, the full eight hours can be compensated.[198]

Other Free Time

For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of that time for his or her personal purposes.[199]

C. Record Keeping

The FLSA requires that employers keep contemporaneous records of hours worked by their employees.[200] If an employer fails to maintain accurate records, the employee can provide a reasonable estimation of the hours worked. The burden then falls on the employer to affirm or deny the reasonableness of the employee's estimation by showing the exact number of hours worked by the employee.[201] Some state labor codes award the employee damages for the employer's failure to maintain records. Employers may also be subject to civil penalties for record-keeping violations and pay stub violations under state laws. However, there is no private right of action to enforce the FLSA's record-keeping provisions.

D. Deductions

A deduction only violates the FLSA if it brings the worker's hourly wages below the minimum wage, or if it cuts into the worker's overtime wages.[202] Generally, an employer who pays a worker cash wages below the minimum wage or overtime may consider certain facilities as credits towards the required wages, *unless:*

- the employee has not actually and voluntarily received the benefit (note that several circuits have held that meal deductions do not need to be voluntary);[203]
- the facilities for which the deduction is taken are furnished primarily for the benefit or convenience of the employer;[204]
- the benefit has been furnished in violation of federal, state, or local law;[205]

196 *Id.* at § 785.21.

197 *Id.* at 785.22(a). Note that "[w]here no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked." *Id.*

198 *Id.* at § 785.22(b).

199 *Id.* at § 785.15.

200 29 U.S.C. § 211(c) (2008).

201 *Anderson*, 328 U.S. at 687.

202 *See* 29 C.F.R. §§ 531.27-28 (2008).

203 *See id.* at § 531.30; *see also* David Bros. Inc. v. Marshall, 522 F. Supp. 628 (N.D. Ga. 1981). *But see* Herman v. Collis Foods, Inc., 176 F.3d 912, 918-19 (6th Cir. 1999) (USDOL regulation requiring deductions for meals to be voluntary is "no longer a viable regulation" and therefore involuntary meal deductions were proper); Davis Bros., Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983) (same); Donovan v. Miller Props., Inc., 547 F. Supp. 785 (M.D. La. 1982), *aff'd* 711 F.2d 49 (5th Cir. 1983) (same).

204 *See* 29 C.F.R. § 531.3(d) (2008); *see also* Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002).

205 *See* 29 C.F.R. § 531.31 (2008); *see also* Archie v. Grand Cent. P'ship, Inc., 86 F. Supp. 2d 262, 270 (S.D.N.Y. 2000) (finding that deductions for housing costs were not proper where they violated state administrative regulations); *but see* Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 638-41 (W.D. Tex. 1999) (finding that 1) deductions for substandard housing is unauthorized; but 2) deductions for housing that is paid to a third party and consented to by the employee is appropriate even if the housing is substandard).

- the credit exceeds the "reasonable cost" of the item;[206] or
- they are not deducted under the terms of a bona fide collective bargaining agreement.[207]

The following deductions might arise in trafficking cases:

Inbound Transportation (Smuggling Fees)

Smuggling fees are the most common charge to victims of trafficking. Though no cases have directly addressed the question of smuggling fees, the FLSA unequivocally prohibits deductions for facilities furnished in violation of federal, state, or local law.[208] Because smuggling violates federal immigration laws, deductions for smuggling fees violate the FLSA to the extent that they bring the worker's wages below the minimum. Similarly, if the worker were transported in violation of federal, state, or local transportation safety laws (e.g., the worker was transported in a severely overcrowded vehicle), deductions for this transportation would also be illegal.

Additionally, a line of cases has developed in the H-2A and H-2B worker context finding inbound transportation costs to be for the benefit of the employer.[209] Therefore, courts have determined that these costs must be reimbursed to the worker during the first workweek, because otherwise the inbound transportation costs, which the worker expended for the employer's benefit, will bring the first week's wages below the minimum.[210]

Finally, the cost of transportation from one worksite to another cannot be deducted.[211] However, the actual cost of transporting a worker from his or her home to the worksite can be deducted so long as the travel time does not constitute hours worked under the FLSA.[212] Arguably, however, charges for transportation beyond normal commuting distances are to the benefit of the employer, and therefore, should not be deducted.[213]

Housing

Generally, the reasonable cost of housing can be deducted from a worker's minimum or overtime wages. However, there are significant exceptions that might arise in the trafficking context. First, if the conditions of the housing violate federal, state, or local law, the employer cannot charge the worker for the housing if it brings the wages below the minimum.[214] Second, if the housing is furnished for the benefit of the employer, the deduction violates the FLSA.[215]

If the housing is legal and is not for the benefit of the employer, the amount of the permissible deduction is frequently disputed. The question of how to calculate the reasonableness of deductions varies between the circuits. For example, the Second Circuit allows a deduction for the "fair rental value" of the housing.[216] Other circuits have found, however, that the employer can only deduct the "actual cost" of providing the housing.[217]

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206 *See* 29 C.F.R. §§ 531.3, 531.33 (2008).

207 *See id.* at § 531.6.

208 *See id.* at § 531.31.

209 *See Arriaga*, 305 F.3d 1228; Rivera v. Brickman Group, Ltd., Case No. 05-1518, 2008 U.S. Dist. LEXIS 1167 (E.D. Pa. Jan. 7, 2008); Marshall v. Glassboro Serv. Assn., Inc., 1979 U.S. Dist. LEXIS 9053, 87 Lab. Cas. (CCH) p 33,865 (D.N.J. Oct. 19, 1979), *sum. aff'd,* 639 F.2d 774 (3d Cir. 1980), *cert. denied,* 101 S. Ct. 1757 (1981); *see also* Torreblanca v. Naas Foods, Inc., 89 Lab. Cas. (CCH) p 33,927 (N.D. Ind. 1980).

210 *See Arriaga*, 305 F.3d 1228.

211 *See* 29 C.F.R. § 531.32(c) (2008).

212 *See id.* at § 531.32(a).

213 *See Arriaga*, 305 F.3d at 1240-41.

214 *See* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1257-8, 1279 (N.D. Okla. 2006) (trafficking case); *Case Farms*, 96 F. Supp. 2d at 638-41.

215 *See, e.g.,* Stewart v. S.U.N.Y. Maritime College, 141 Lab. Cas. (CCH) ¶ 40,166 (S.D.N.Y. Sept. 19, 2000). *But see* Soler v. G. & U., Inc., 833 F.2d 1104, 1110-11 (2d Cir. 1987) (housing furnished to migrant workers was not to the benefit of the employer).

216 *See Soler*, 833 F.2d at 1111, *later proc.,* 768 F. Supp. 452 (S.D.N.Y. 1991).

217 *See, e.g.,* Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1513-14 (11th Cir. 1993); Donovan v. Williams Chem. Co., 682 F.2d 185, 189 (8th Cir. 1982); Lopez v. Rodriguez, 668 F.2d 1376, 1381 (D.C. Cir. 1981).

Meals

Only the actual cost of meals may be deducted from a worker's minimum wages.[218] The employer, however, need not calculate the cost of providing each meal to each individual employee, but rather may deduct the average cost of providing the meals to a group of workers.[219] Obviously, deductions from wages for alcohol furnished without the proper license, and deductions for illegal drugs, both violate the FLSA.

Essential Tools and Uniforms

"Tools of the trade and other materials and services incidental to carrying on the employer's business" are for the benefit of the employer, and therefore, charges for these materials cannot be deducted from a worker's wages.[220] Likewise, an employer cannot charge a worker for the purchase[221] or rental of a uniform "where the nature of the business requires the employee to wear a uniform."[222]

FICA and Other Employment Taxes

Deductions for taxes are permitted to bring a worker's wages below the minimum if (1) the employer remits the withheld taxes to the appropriate agency, and (2) the underlying law permits the employer to deduct the taxes.[223] In the trafficking context, employers who know that their employees are using false Social Security numbers often withhold payroll taxes but do not report these withholdings to the IRS or the state taxing authority. This, of course, is a violation of the FLSA and of other federal and state laws. Likewise, some employers attempt to charge workers with the employer's portion of the payroll taxes. As this charge is illegal under federal tax law, it also violates the FLSA if it brings the worker's wages below the minimum.

Payments of Debts

As discussed above, payment of a debt incurred for an activity that violates the law, such as a smuggling fee or charges for illegal drugs, is prohibited under the FLSA. However, an employer *may* advance wages to a worker and then deduct the advance from the worker's paycheck, even if it cuts into the minimum wages.[224] However, if the employer benefits in any way, such as through a profit, kickback, or other means, the debt charge is illegal if it reduces the wages below the minimum.[225] You should also look at your state labor law, which may impose requirements on employers advancing money to workers. If the employer failed to follow a procedure dictated by state law, recuperating a debt from a worker's wages would violate the FLSA because the loan was a "facility" provided in violation of state law.

E. Statute of Limitations

Actions for non-willful violations of the FLSA must be commenced within two years after the violation occurs. Actions for willful violations of the FLSA must be commenced within 3 years after they occur.[226] Still, there

218 29 C.F.R. § 531.3(a) (2008); Field Operations Handbook, § 30.09(b) (U.S. Dep't Labor 1988); *compare* Herman v. Collis Foods, Inc., 176 F.3d 912, 920-21 (6th Cir. 1999).

219 *Herman*, 176 F.3d at 920-21 (6th Cir. 1999).

220 29 C.F.R. § 531.3(2)(i) (2008).

221 *Id.* at § 531.3(d)(2)(iii).

222 *Id.* at § 531.32(c).

223 *Id.* at § 531.38.

224 Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1369 (5th Cir. 1973).

225 *Id.*; 29 C.F.R. § 531.35 (2008).

226 29 U.S.C. § 255 (2008).

are several cases which suggest that if an employer fails to post notice of FLSA rights and/or promises to catch workers up in unpaid wages, the employer is estopped from later arguing statute of limitations.[227]

F. Damages

An employer who violates the minimum wage and maximum hours provisions of the FLSA is liable to the employee for the amount of their unpaid wages and overtime. Additionally, the employer will almost always be liable for an additional, equal amount as liquidated damages.[228]

Defendants in violation of the FLSA must also pay a plaintiff's reasonable attorney's fees in addition to any judgment awarded.[229] Civil penalties of up to $10,000 may be awarded in certain circumstances.[230] Injunctive relief is available to restrain violation of the minimum wages or overtime provisions of the Act, or the prohibition on engaging in transport of items produced in violation of such provisions.[231] Some circuits also allow the award of punitive damages.[232]

G. Other Protections

The FLSA prohibits an employer from firing or otherwise retaliating against an employee for exercising his or her rights under wage and hour laws.[233] An employer's improper behavior during litigation may itself also constitute a violation of the FLSA's anti-retaliation provisions.[234] An employer who violates the anti-retaliation provisions is liable for legal or equitable relief, such as employment, reinstatement, promotion, and payment of wages lost plus an additional amount as liquidated damages.[235]

The FLSA does not require severance pay, sick leave, vacations, or holidays.[236]

H. FLSA Coverage

The minimum wage provision of the FLSA provides that "[e]very employer shall pay [the minimum wage] to each of his employees who in any workweek is engaged in commerce or in the production of goods for

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227 *See, e.g.,* U.S. v. Sabhnani, Case No. 07-cr-429, 2008 U.S. Dist. LEXIS 55108, *14-15 (E.D.N.Y. June 19, 2008) (in forced labor criminal prosecution, FLSA statute of limitations equitably tolled because "not only was there no notice, but the women could not speak English. They were completely unaware of the FLSA or any of its minimum wage or overtime provisions"); *Iglesias-Mendoza*, 239 F.R.D. 363, 369 (S.D.N.Y. 2007) (in representative action, FLSA opt-in class allowed for entire six-year statute of limitations period because plaintiffs alleged there was no FLSA poster); Baba v. Grand Cent. P'ship, No. 99 Civ. 5818, 2000 U.S. Dist. LEXIS 17876 (S.D.N.Y. Dec. 7, 2000) (equitable tolling denied where there was no FLSA poster); Henchy v. City of Absecon, 148 F. Supp. 2d 435, 438-39 (D.N.J. 2001); Cisneros v. Jinny Beauty Supply Co., No. 03 C 1453, 2004 U.S. Dist. LEXIS 2094 (N.D. Ill. February 5, 2004); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. September 30, 2002) (defendants' failure to post the notice required tolled the limitations period until the employee acquired a general awareness of his rights under the FLSA); Kamens v. Summit Stainless, Inc., 586 F. Supp. 324 (E.D. Pa. 1984). *But see* Claeys v. Gandalf Ltd., 303 F. Supp. 2d 890 (S.D. Ohio 2004) (plaintiff failed to show that employer willfully or recklessly violated FLSA overtime requirement); *see also* Viciedo v. New Horizons Computer Learning Ctr. of Columbus, 246 F. Supp. 2d 886 (S.D. Ohio 2003) (though plaintiff did not see posting, other witness did).

228 29 U.S.C. § 216(b) (2008); *Chellen*, 446 F. Supp. 2d at 1279-81 (liquidated damages awarded in trafficking case, when defendants failed to show a reasonable and good faith belief that they were executing a "training program"); *but see* 29 C.F.R. § 790.22(b) (2008) (setting forth limited prerequisites for the court to exercise discretion in the award of liquidated damages).

229 29 C.F.R. § 790.22(d).

230 *See* 29 U.S.C. § 216(a) (2008) (penalties relating to transport of items produced in violation of the Act); *see also* 29 U.S.C. § 216(e) (2008) (penalties arising from child labor violations).

231 29 U.S.C. § 217 (2008).

232 *See* Travis v. Gary Cmty. Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) (plaintiff entitled to punitive damages under FLSA, 29 U.S.C.S. § 215(a)(3), because damages under that section were not limited). *But see* Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000) (holding that punitive damages go beyond the statutory goal of making a plaintiff whole again, so are not available in an anti-retaliation claim).

233 29 U.S.C. § 215(a)(3) (2008).

234 *See, e.g.,* Torres v. Gristede's Operating Corp., Case No. 04 Civ. 3316, 2008 U.S. Dist. LEXIS 66066, *58-69 (S.D.N.Y. Aug. 28, 2008) (counterclaim against plaintiff violated the FLSA's anti-retaliation provisions).

235 29 U.S.C. § 216(b).

236 It can be argued that there should be a private right of action to enforce the hot goods provision of the FLSA. However, the provision has not yet been litigated yet. *See, e.g.,* Lara Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179, 2208-09 (1994).

commerce, ... *or* is employed in an enterprise engaged in commerce or in the production of goods for commerce. ..."[237] The FLSA's overtime provision has an identical commerce requirement.[238]

For enterprise coverage, the enterprise must have annual gross volume "of sales made or business done" of not less than $500,000.[239] However, enterprise coverage and interstate commerce coverage are mutually exclusive. For an employer to show that it is exempt under these provisions of the Act, it must show that it is subject to *neither* interstate commerce coverage *nor* enterprise coverage.[240]

The FLSA affords protection to "any individual employed by an employer" who has "suffered or [is] permit[ted] to work."[241] The "economic reality" test is used to determine whether this employment relationship exists for purposes of FLSA enforcement. The test analyzes the circumstances of the whole activity to determine whether the individual is economically dependent on the supposed employer.[242] Some of the factors that may be considered in this analysis include: direct or indirect supervision of employees and direct or indirect authority to determine and modify employment terms.[243] Whether an individual meets the definition of an employee under the FLSA is not affected by factors, such as the place where the work is performed, the absence of a formal employment agreement, the time or method of payment, or whether an entity is licensed by the state or local government.[244]

While the FLSA applies to nearly every occupation and industry, special rules may modify or limit recovery in some situations. The rules that are particularly relevant to human trafficking cases are described below. An employer who claims an exemption under the FLSA has the burden of showing that it applies.[245]

Undocumented Workers

A worker's immigration status is irrelevant in determining "employment relationship" for purposes of FLSA enforcement. All workers are protected under the FLSA regardless of immigration status. Widespread misunderstanding regarding back pay recovery for undocumented workers has occurred due to *Hoffman Plastic Compounds v. NLRB*.[246] In *Hoffman Plastics*, an undocumented worker who used falsified immigration documents to secure employment attempted to assert his rights under the National Labor Relations Act, alleging that he was wrongfully terminated in retaliation for his participation in a unionization campaign. The court determined that the plaintiff was not entitled to recover for wages he would have earned had he not been fired.[247] However, *Hoffman Plastics* does not limit recovery of any unpaid wages and overtime for work already

237 29 U.S.C. § 206(a) & (b) (emphasis added).

238 *See* 29 U.S.C. § 207(a)(1).

239 *See* 29 U.S.C. § 203(s)(1)(A)(ii).

240 *See, e.g.*, 29 C.F.R. § 776.22a (referring to enterprise coverage, "any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged 'in commerce or in the production of goods for commerce'"); *see also* Wirtz v. Melos Constr. Corp., 408 F.2d 626, 627 (2d Cir. 1969) (explaining that the 1961 amendments to the FLSA adding enterprise coverage *expanded* coverage of the Act beyond employees who were themselves engaged in commerce).

241 29 U.S.C. at § 203(e) and (g).

242 Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).

243 Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

244 *See* Chapter 2, § V(B), *supra*, for a discussion of joint employment standards.

245 *See* Walling v. Gen. Indus. Co., 330 U.S. 545 (1947); *see also* Mitchell v. Kentucky Fin. Co., 359 U.S. 290 (1959).

246 535 U.S. 137 (2002).

247 *Id.* at 151-52.

performed.[248] It has also been held that *Hoffman Plastics* does not bar undocumented workers from receiving compensatory and punitive damages for retaliation under the FLSA.[249] Still, there remains some uncertainty as to whether courts will extend *Hoffman Plastics'* limitations on back pay to other types of remedies in suits brought by undocumented workers. For more information on *Hoffman Plastics* and advocacy efforts aimed at broadening worker protections for undocumented immigrants, go to the National Employment Law Project website at www.nelp.org.

Sex Workers

Although forced prostitution is not covered by the FLSA since it is considered illegal employment, other types of employment and legal commercial sex work may be covered. Congress intended the FLSA to apply to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," so the FLSA presumably covers any work, including legal commercial sex work, that violates fair hours and pay standards.[250] For example, legal sex workers, such as exotic dancers, who work immensely irregular hours without a bona fide contract that specifies overtime pay, would have an actionable claim under the FLSA.[251] However, sex workers could be exempted from FLSA coverage if their place of work is considered a "recreational center" that does not operate for more than seven months of the year.[252] Even in the absence of an FLSA claim, victims of sex trafficking have many other causes of action available to them.

Relatives

When an enterprise's only regular employees are the owner and the owner's parent, spouse, child, brother, sister, grandchildren, grandparents, and in-laws, it is not a covered enterprise or part of a covered enterprise for purposes of FLSA.[253]

While this exemption may preclude enforcement of the FLSA in cases of servile marriage or where certain family members are trafficked for forced labor, numerous other claims can be brought for both compensatory and punitive damages.[254]

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248 In *Hoffman Plastics*, the Court denied an NLRB claim for "backpay" based work not yet performed, but compensation that the plaintiff would have received had he not been wrongfully terminated. *Id.* at 148-49. This situation may be distinguished from a plaintiff who seeks "backpay" in the form of payment for labor already performed but never compensated. *See* Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-03 (W.D. Mich. 2005) (rejecting defendant's argument that *Hoffman Plastics* bars an undocumented worker's claim for backpay under FLSA based on work already performed); Flores v. Albertsons, Inc., No. CV 01-00515 AHM (SHx), 2002 U.S. Dist. LEXIS 6171, at *17-20 (C.D. Cal. Apr. 9, 2002) (same); *Liu*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); *see also* Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 243 (2d Cir. 2006) (dicta indicating that, in FLSA claim for unpaid wages, "the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.").

249 *See Chellen*, 446 F. Supp. 2d at 1277-78 ("Hoffman does not preclude an award for work actually performed…"); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (though this human trafficking case was somewhat damaging in its rulings against plaintiffs on their RICO and 42 U.S.C. § 1985 claims, it contains perhaps some of the strongest post-*Hoffman Plastics* language supporting undocumented immigrants' rights to pursue FLSA claims); Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

250 29 U.S.C. § 202 (2008).

251 *Id.* at § 207(f).

252 *Id.* at § 213(3)(A).

253 *Id.* at § 203(s)(2).

254 *Singh*, 214 F. Supp. 2d at 1061.

Domestic Service Workers

The FLSA distinguishes between live-in and non-live-in domestic workers.[255] Domestic service employees[256] who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work only during the day. However, the FLSA contains exemptions for domestic service employees who provide "companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[257] The FLSA regulation interpreting the meaning of "domestic service employment" and therefore the extent of the exclusion includes only companionship services workers who are employed by the person they are providing services for (rather than those employed by a third party agency).[258] The Supreme Court recently held that the 29 C.F.R. § 552.109(a) FLSA regulation in the "Interpretations" section is the controlling interpretation.[259] FLSA regulation 552.109(a) states that even companionship services workers who work for third party agencies are included in "domestic service employment" and therefore exempted from the FLSA.[260]

Still, employers must pay live-in workers the applicable minimum wage rate for all hours worked.

Be sure to check your state's wage and hour laws as many states do provide overtime relief for live-in domestic workers. For example, California provides time and a half to live-in domestic workers after nine hours worked in a workday and two times the regular pay after nine hours worked on the sixth or seventh day worked in a workweek.[261] New York and New Jersey also give some overtime protections to live-in domestic workers under state law.[262]

The FLSA regulations provide for a special interpretation of calculating hours worked for live-in domestic workers, which differs from the general rule.[263] "In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits."[264] A copy of this agreement can be used to establish hours worked in the absence of a contemporaneous time record, allowing employers of live-in domestic workers to be exempt from the general FLSA record-keeping requirement.[265] However, the employer must still show that this agreement reflects actual hours worked.[266] The definition of free time for live-in domestic workers is the same as the general rule.[267] "For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable

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255 Workers such as "babysitters employed on a casual basis, companions for the aged and infirm, and domestic workers who reside in their employers' households" do not enjoy protection under FLSA. 165 A.L.R. Fed. 163; *see* 29 U.S.C. § 213(b)(21) (2000).

256 "Domestic service employment refers to services of a household nature performed by an employee in or about a private home … (t)he term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis." 29 C.F.R. § 552.3 (2008).

257 29 U.S.C. § 213(a)(15).

258 *See* 29 C.F.R. § 552.3.

259 Long Island Care at Home, Ltd., v. Coke, 127 S. Ct. 2339 (U.S. 2007).

260 *See* 29 C.F.R. § 552.109(a).

261 Cal. Code Regs. tit. 8, § 11150(3)(B) (2008).

262 *See, e.g.,* N.Y. Lab. Law § 651, et. seq. (2008); N.Y. Comp. Codes R. & Regs. tit.12, § 142-2.2; Topo v. Dhir, No. 01 Civ. 10881, 2004 U.S. Dist. LEXIS 4134 (S.D.N.Y. March 15, 2004).

263 Note that the "casual babysitting" exception of the FLSA domestic worker coverage is narrowly construed and is intended for teenagers and others not dependent on the income. *See, e.g., Topo*, 2004 U.S. Dist. LEXIS 4134, at *9-10.

264 29 C.F.R. § 552.102(a) (2008).

265 *Id.* at § 552.102(b).

266 *Id.*

267 *Id.* at § 552.102(a).

the employee to make effective use of the time."[268] "If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked."[269]

Proving hours worked in domestic worker cases can be difficult since it is often the employer's word against the employee's. However, your client can produce evidence of the extent of their work with witnesses or lists of tasks that the employer may have ordered your client to complete. Domestic workers who were caring for children can corroborate their work schedule with the child's daily schedule.

Farmworkers

Agricultural workers[270] are entitled to the federal minimum wage of $5.15 per hour, with some exceptions.[271] However, they are exempt from the FLSA's overtime requirements.[272] Keep in mind, however, that the FLSA definition of agriculture is fairly limited. Therefore, many packing shed workers, and any worker changing the raw, natural state of the agricultural product, *are* eligible for overtime.[273]

Further exemptions apply to agricultural workers less than 16 years of age, particularly if employed by their parents. (*See* "Children" *below*.)

Joint employment liability almost always exists when agricultural employers utilize the services of farm labor contractors. In these situations, both the grower and the contractor are responsible for complying with the FLSA.

Agricultural employers must also comply with the Migrant and Seasonal Agricultural Worker Protection Act, which provides farmworkers with additional industry-specific protections. (*See* § V, "Migrant and Seasonal Agricultural Worker Protection Act.")

Children

The FLSA provides both added protections and exemptions for children. The FLSA protects against oppressive child labor in three major areas: (1) hour regulation, (2) age limitations, and (3) regulation of hazardous occupations.[274] The FLSA provides that no producer, manufacturer, or dealer shall ship or deliver goods using oppressive child labor.[275] In addition, "no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce ..."[276] "Oppressive child labor" can occur when the employer violates the minimum age or hazardous job requirements.[277] The standard can vary greatly depending on the nature of the work (agriculture, non-agriculture or a job deemed particularly hazardous like mining and manufacturing), and whether the child is working for a parent.[278] The largest exemption in child minimum age and hazardous job restrictions occurs when the child is employed by his or her parent or by a person standing in the parent's place, except in manufacturing or mining occupations. These parental exceptions are particularly loose in the agricultural context.[279] Additional regulations granted to the Secretary of Labor under section

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268 *Id.*

269 For domestic workers, it can be argued that sleeping with a child is working because the worker is giving the employer the benefit of their services by comforting or tending to the child.

270 Agricultural work is defined as work performed on a farm as an incident to or in conjunction with farming operations. *See* 29 U.S.C. § 203(f) (2008). The USDOL regulations further refine this definition. *See generally* 29 C.F.R. § 780, *et seq.* (2003).

271 The farmworker minimum wage exemptions are set forth in 29 U.S.C. § 213(a)(6) (2008).

272 29 U.S.C. § 213 (2008).

273 *See* 29 C.F.R. § 780, *et seq.* (2003).

274 29 U.S.C. §§ 203(l), 212, 213(c) (2008).

275 *Id.* at § 212.

276 *Id.* at § 212(c) (basic child labor guidelines are found in this section).

277 *Id.* at § 203(l).

278 *Id.*

279 29 C.F.R. § 570.2(a)(2) (2008); *see also* 29 U.S.C. § 213(c) (2008) (outlining particular tasks deemed unfit for youth).

212(b) of the FLSA have added some substance to the FLSA guidelines. For example, youth under the age of 14 are not allowed to work any non-agricultural job with the exception of acting or delivering newspapers.[280]

There are specific guidelines for youth engaged in work experience and career exploration programs.[281]

There is also minimum wage exception for youth. This allows an employer to pay any newly hired employee under 20 years old less than minimum wage.[282] The pay rate is set at $4.25 for the first 90 consecutive calendar days of employment.[283]

For details on required certification when employing children, *see* 29 C.F.R. § 570.5-.12.

Non-Agriculture

The minimum age standards in all occupations *except* agriculture are as follows:

- 16 years old is the general minimum age requirement.[284]
- Youth who are age 14-16 may work in occupations other than manufacturing or mining when the employment does not overlap with school hours, or otherwise interfere with the child's schooling or health and well-being.[285]
- Youth who are age 14 and 15 cannot work more than 3 hours a day or 18 hours a week when school is in session and they cannot work more than 8 hours a day and forty hours a week when school is not in session.[286]
- Youth who are age 14 and 15 can only work between 7:00 a.m. and 7:00 p.m. during the school year. The hours extend to 9:00 p.m. between June 1 and Labor Day.[287]
- When the employment is found particularly hazardous by the Secretary of Labor or detrimental to their health and well-being, the youth must be 18 or older.[288]
- Youth who are age 18 or older are not subject to any restrictions on jobs or hours.[289]

Agriculture

The minimum age requirement for children working in agriculture is generally 16 when the employment is during school hours and the job is within the school district in which the minor is living at the time.[290] There are major exceptions under agriculture that allow children younger than 12 to work when the employer is the child's parent or a person standing in place of the parent on a farm owned and operated by this person.[291] In addition, children under these circumstances are not protected against hazardous occupation as they would be in non-agricultural work. When the agricultural employment takes place outside school hours, the age limit drops to 14, though 12- and 13-year-olds may be employed with written parental consent and a child under 12 may be employed by his or her parent on a farm owned or operated by the parent or on a farm where all employees are exempt from the minimum wage provisions as per FLSA guidelines.[292]

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280 29 C.F.R. §§ 570.124-125 (2008).
281 *See id.* at § 570.35.
282 29 U.S.C. § 206(g) (2008).
283 *Id.*
284 29 C.F.R. § 570.2(a)(1) (2008).
285 *Id.* at § 570.2(a)(1)(i).
286 *Id.* at § 570.35.
287 *Id.*
288 *Id.* at § 570.2(a)(1)(ii).
289 *Id.* at § 570.2.
290 29 U.S.C. § 213(c) (2000).
291 29 C.F.R. § 570.2(b)(1)-(2) (2008).
292 *Id.*

Child Labor restrictions *do not* apply to:

- Youth over 14 when the work is not declared hazardous and the employment is outside school hours.[293]
- Children age 12 or 13 with consent from a parent, or who work on the same farm as a parent, provided the work is outside school hours.[294]
- Children under the age of 12 when employed by the parent or person standing in place of a parent on a farm owned by this person.
- Youth under 12 employed on a farm are exempt from minimum wage requirements outside school hours with parental consent.[295]
- Children 10 or 11 working as hand harvest laborers for no more than 8 weeks in a calendar year, subject to USDOL waiver.[296]
- There is limited protection for children under 16 for hazardous activities.[297]

Trainees

The U.S. Supreme Court has held that trainees are not employees within the meaning of the FLSA.[298] However, it is common for employers to misclassify employees as trainees to avoid complying with the FLSA's minimum wage and overtime requirements.

The USDOL Wage and Hour Division has urged that the following factors be considered in determining whether someone is a trainee or an employee:

> The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; [t]he training is for the benefit of the trainee; [t]he trainees do not displace regular employees, but work under close observation; [t]he employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his or her operations may actually be impeded; the trainees are not necessarily entitled to a job at the completion of the training period; [t]he employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.[299]

In one human trafficking case, the Court engaged in a very detailed examination of these factors and concluded that the plaintiffs were employees, rather than trainees.[300]

I. Civil Penalties for Child Labor Violations

FLSA section 16(e)[301] specifically addresses civil penalties for violations of child labor.

- Each "oppressive child labor" violation, or violation of FLSA sections 12 or 13(c)[302] is not to exceed $11,000 per employee.[303]

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293 29 U.S.C. § 213(c) (2008).

294 *Id.*

295 29 C.F.R. § 570.2(b) (2008).

296 *Id.* at § 575.1(b)(5).

297 *See id.* at § 570.71 (listing particular jobs in agriculture considered hazardous).

298 *See* Walling v. Portland Terminal Co., 330 U.S. 148, (U.S. 1947).

299 Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (citing Wage & Hour Manual (BNA) 91:416 (1975), but finding that this examination should be based on the totality of the circumstances, rather than the "all or nothing" approach suggested by USDOL); Archie v. Grand Cent. P'ship, 997 F. Supp. 504, 531-32 (S.D.N.Y. 1998) (similar, but referencing 1980 update of WH Manual).

300 *See* Chellen v. John Pickle Co., 334 F. Supp. 2d 1278, 1294 (N.D. Okla. 2004).

301 29 U.S.C. § 216(e) (2008).

302 *Id.* at §§ 212, 213(c).

303 The FLSA language outlining how to calculate the damages takes into consideration the available evidence of the violation in conjunction with the size of the business and gravity of harm. 29 U.S.C. § 216(e)(3) (2008); *see also* 29 C.F.R. § 579.5(a) (2008).

- Willful minimum wage and maximum hour violations — FLSA sections 6 and 7[304] — are $1,100 per violation.[305]

There is *no* private right of action for FLSA child labor violations. Therefore, any child labor violations should be reported directly to the USDOL.

J. Enforcement of the Fair Labor Standards Act

The injured worker can bring a claim in federal district court under the FLSA, or file a complaint with the USDOL. The USDOL has its own prosecutors, called solicitors, and may institute an action on behalf of one or more employees in federal court, but only if the employer is unwilling to cooperate. If the USDOL solicitors bring an action in court on the employee's behalf, the employee's right to bring a separate action under the FLSA terminates.[306]

It is important to keep in mind that the USDOL is charged with enforcing the FLSA and does not necessarily represent the interest of the worker. While the USDOL may be able to obtain a quicker judgment for the employee, a private lawsuit will give your client more control over the direction of his or her case. Be sure to check your state labor code as your state statute may provide for greater wage and hour protections than the FLSA, as well as additional remedies against employer misconduct.

VI. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT[307]

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), affords significant protections to migrant and seasonal farmworkers. The AWPA imposes specific requirements for housing conditions, transportation safety and insurance, wage statements, payroll records, working arrangement enforcement, farm labor contractor registration, and disclosure of the terms and conditions of employment. Attorneys with farmworker legal services programs around the country have developed expertise in AWPA litigation. If you are representing a farmworker in a trafficking case and you are not familiar with the AWPA, please contact author Werner for a list of farmworker legal services providers in your area.

VII. TITLE VII[308]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of any of the following protected categories: race, color, religion, national origin, or sex. The 1978 Pregnancy Discrimination Act amended Title VII to include pregnancy as a protected category.[309] Employers may not "fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[310]

304 29 U.S.C. §§ 206-07 (2008).
305 *Id.* at § 216(e)(2).
306 *Id.* at § 216(b).
307 *Id.* at § 1801 *et seq.*
308 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2008); Portions of this section were adapted with permission from the Legal Aid Society, Employment Law Center, Workers' Rights Clinic Employment Law Manual, 2003.
309 42 U.S.C. § 2000e(k).
310 *Id.* at § 2000e2.

Title VII violations in the human trafficking context are common, particularly in situations of sexual, racial or national origin harassment and other types of discriminatory treatment. Note that Title VII *only* applies to employers with fifteen or more employees.[311]

A. Proving Discrimination

While discrimination in the workplace context arises in many variations, there are at least three discrete theories of proving employment discrimination. To establish a Title VII employment discrimination claim on the basis of race, color, sex, sexual orientation, national origin, age, religion, or disability, one of the following theories may apply: individual disparate treatment, systemic disparate treatment, and disparate impact.

Individual Disparate Treatment

Individual disparate treatment occurs when an employer treats an employee in a manner that differs from how other employees are treated on the basis of his or her race, color, religion, sex, or national origin. An individual disparate treatment claim must establish a *prima facie* case by demonstrating the following elements:

- the employee must be a member of a protected class;
- the employee must be either qualified for the job opening or performing satisfactorily in the job;
- an adverse action must have occurred against the employee; and
- evidence of discrimination after the employee was fired, not hired, etc., must be shown.

After the above elements have been established, the burden shifts to the employer to provide a "legitimate, non-discriminatory reason" for the adverse action. If the employer puts forth a legitimate, non-discriminatory reason, the burden shifts back to the employee. The employee must show that the employer's reason was a "pretext," which means the employer had a different, unlawful reason for its adverse action. An employee can establish a pretext through direct or indirect evidence.[312]

Mixed Motive

Mixed motive cases occur when the employer acted discriminatorily because of several motivating factors, one of which was the employee's membership in a protected class. The employee can establish a mixed motive violation by proving that race, color, religion, sex or national origin was a "motivating factor" for any employment practice.[313] However, if the employer demonstrates that it would have made the same decision without the "impermissible motivating factor," the employer can avoid reinstating the employee or paying damages.

Stray Remarks

A stray remark has been defined as an ambivalent comment. More specifically, it is a comment by someone lacking the authority to make decisions, or by a decision maker that is unrelated to the actual decision-making process. If an employer makes a single, isolated, discriminatory comment it rarely suffices to establish employment discrimination.[314]

Systemic Disparate Treatment

Systemic disparate treatment arises when an employer discriminates against a worker and tends to similarly discriminate against many people who belong to the same protected class.[315] Systemic disparate treatment may occur in the following manner:

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311 *Id.* at § 2000e.

312 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

313 Civil Rights Act of 1991, 42 U.S.C. § 1981 (2008).

314 Price Waterhouse v. Hopkins 490 U.S. 228, 261 (1989) (distinguishing between direct evidence of discrimination and stray remarks in Justice O'Connor's concurrence).

315 *See, e.g.,* E.E.O.C. v. Sears, Robeuck & Co., 628 F. Supp. 1264, 1280 (N.D. Ill. 1986).

Facial Discrimination

Facial discrimination cases arise when the employer has a policy or employment requirement that clearly discriminates against one group but claims that there is a legitimate reason for the policy. The legitimate reason defense can be met if the employer provides a justification for the policy or shows that the requirement is a "*bona fide* occupational qualification" or "BFOQ." To establish this, the employer must show (1) the requirement is "reasonably necessary to the normal operation of the particular business;" and (2) without the requirement, "all or substantially all" of the excluded people would be unable to "safely and efficiently" perform the job, or dealing with people on an individual basis would be "impossible or highly impractical."[316]

Pattern and Practice

Pattern and practice cases occur when an employer has unstated policies that produce a "pattern and practice" of discrimination against a Title VII protected group within the company. Pattern and practice discrimination may be established through the use of statistical evidence illustrating a difference between the composition of the employer's labor force and that of the "qualified relevant labor market." Once the employee's *prima facie* case is established, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the difference in composition between the employer's labor force and the available labor force. If the employer meets this burden, the employee must show that the employer's reason is a pretext.[317]

Disparate Impact

A claim of disparate impact arises when one group of people is more adversely affected by an employer's "neutral" employment practice than others. Under disparate impact claims, it is unnecessary to show the employer's intent to discriminate. Instead, the employee must establish that the employment practice disproportionately has an adverse impact on a protected class, at which point the burden shifts to the employer. The employer must show that the practice is required by a business necessity. However, even if business necessity is shown, the employee can prove a violation if an alternative practice exists that would achieve the employer's business necessity while having a lesser disparate impact.[318]

B. Sexual Harassment

Sexual harassment is a form of sex discrimination in violation of Title VII.[319] Traditionally, courts have recognized two different forms of sexual harassment: *quid pro quo* and "hostile work environment."

Quid Pro Quo

Essentially, *quid pro quo* is a type of sexual harassment that involves adverse employment decisions resulting from an employee's refusal to accept a supervisor's demands for sexual favors or to tolerate a sexually charged work environment.[320] The plaintiff's *prima facie* case must show that he or she suffered a "tangible job action," which the Supreme Court has defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[321]

316 Int'l Union, United Auto., etc. v. Johnson Controls, 499 U.S. 187, 215-16 (1991).

317 Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 874-75 (7th Cir. 1994).

318 Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity ... [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

319 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

320 Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

321 Burlington Indus., v. Ellerth, 524 U.S. 742, 761 (1998).

"Hostile Work Environment"

A plaintiff employee can also establish Title VII liability by showing that he or she was unlawfully subjected to hostile, offensive, or intimidating behavior that is so "severe and pervasive that it alters the conditions of the plaintiff's employment and creates an abusive working environment."[322] To prove a "hostile work environment" claim, the employee plaintiff must show that he or she was subjected to conduct that was (1) based on sex,[323] (2) unwelcome,[324] and (3) sufficiently severe or pervasive to alter the condition of plaintiff employee's employment and create an abusive working environment.[325]

C. Other Harassment: Race and/or National Origin

Federal law requires employers to provide a work environment free of racial harassment, which may include taking positive steps to redress or abolish the intimidation of employees. Discrimination in violation of Title VII occurs where an employer fails to take reasonable action to eliminate racial harassment. An employee must show that the harassment is pervasive (more than isolated or sporadic events[326]) in order to establish a Title VII violation. Courts may look to the totality of the circumstances, the gravity of the harm, and the nature of the work environment in determining whether the harassment is sufficiently pervasive to constitute a violation. Other factors the court may consider are the relationship of the employee to the alleged perpetrator, and whether there is evidence of other hostility, such as sexual harassment, in addition to the racial harassment.

"Hostile Work Environment"

A "hostile work environment" has specific meaning and arises when the emotional, psychological, and physical stability of minority employees is adversely impacted by the racial discrimination in the workplace. Liability based on a "hostile work environment" theory may exist without a showing of economic loss to the employee. An employee can generally establish a "hostile work environment" by showing there is a continuous or concerted pattern of harassment by co-employees that remain uninvestigated and unpunished by management.[327]

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322 Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (citing *Meritor Sav. Bank* at 65-69).

323 Sex-based conduct may include, but is not limited to, sexual advances, requests for sexual favors, or other verbal, visual, or physical conduct of a sexual nature. However, a sexual harassment claim based on the creation of a hostile work environment need not have anything to do with sexual advances. *See, e.g.,* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."); *Meritor Sav. Bank*, (So long as the harassing conduct is based on gender, it violates the law as harassment based on sex, even if the harassing conduct is not in itself sexual). Accordingly, same-sex harassment is actionable under Title VII, regardless of the harasser's sexual orientation. *Oncale*, 523 U.S. at 80 ("A trier of fact might reasonably find ... discrimination ... if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

324 A complainant may demonstrate that the conduct was unwelcome by showing, among other things, emotional distress, deteriorating job performance, that he or she avoided the harasser, that he or she informed friends or family of the harassment, that he or she complained to the harasser or other company representatives of the harassment, or absence of evidence showing the conduct was welcome or encouraged. The fact that sex-related conduct was 'voluntary,' in the sense that the plaintiff employee was not forced to participate against his or her will, *is not a defense* to a sexual harassment suit. *Meritor Sav. Bank*, 477 U.S. at 67-68.

325 *Id.* at 65-69. To show that the harassing conduct was severe or pervasive enough to create an abusive working environment, the plaintiff employee must meet *both* an (i) objective *and* (ii) a subjective standard. *Harris*, 510 U.S. 17,21 (1993). Under the objective standard, plaintiff employee must show that a *reasonable* woman would have considered the conduct severe or pervasive. Ellison v. Brady, 924 F.2d 872, 878 (1991) ("[A] female plaintiff states a *prima facie* case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."). Or that in consideration of the *totality of circumstances* the environment was sufficiently hostile or abusive. *Harris*, 510 U.S. at 22 (listing factors considered in the totality of circumstances test). Under the subjective standard, plaintiff employee needs to show that she *actually* found the conduct sufficiently severe or pervasive to interfere with the work environment. *Id.* The fact finder must take the plaintiff's fundamental characteristics into consideration. Conduct by employer does not need to seriously affect an employee's psychological well-being or lead the employee to suffer injury in order to be actionable under Title VII. *Harris*, 510 U.S. at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown. ... So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.").

326 *See, e.g., Chellen*, 434 F. Supp. 2d at 1106 (in trafficking case, hostile work environment existed where the workplace "was characterized by the severe and pervasive intimidation, ridicule and insult for the ... plaintiffs."); *but see* Pierson v. Norcliff Thayer, Inc. 605 F. Supp. 273 (E.D. Mo. 1985) (denying Title VII violation claim where there were four specific instances of racial harassment).

327 Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 41 FEP 721 (7th Cir. 1986) (finding a hostile work environment where there was insufficient remedial action in response to racial jokes told by upper management).

Employer Liability for Behavior of Supervisors, Co-Workers, and Third-Parties

Traditional agency principles determine employer liability for the acts of supervisory employees. Employers are strictly liable for hostile work environment harassment by supervisors.[328] There is no individual liability for supervisors under Title VII. When a non-supervisory co-worker harasses an employee, the employer's conduct is reviewed for negligence. Once an employer knows or should know of harassment by a co-worker, remedial obligations begin, and the employer is liable for the hostile work environment created by a co-worker unless it takes adequate remedial measures. Employers may also be liable for the harassment of their workers by customers, clients, or personnel of other businesses with which the employer has an official relationship. An employer will be held liable if it has acquiesced to the situation, or simply failed to exercise any control it possessed to stop the harassment. Liability is generally denied when the employer takes appropriate steps to stop the harassment.[329]

D. Retaliation by Employer

It is a violation of Title VII for an employer to retaliate against employees who make Title VII complaints.[330] The plaintiff employee may still be able to assert a successful claim of unlawful retaliation even if the underlying claim of discrimination is found to be without merit. The employee's conducts will likely be protected if his or her opposition was based on a "reasonable belief" that his or her employer was violating anti-discrimination laws.[331] In addition, the plaintiff (the employee complaining of discrimination) need not be a member of the protected class of people who are being discriminated against.

E. Filing Process and Statute of Limitations

To assert a Title VII claim, the employee must first file a claim with the U.S. Equal Employment Opportunity Commission ("EEOC") to exhaust administrative remedies. The employee must file the discrimination claim with the EEOC within 180 days of the discriminatory act, or within 300 days if the state's antidiscrimination law proscribes a longer period.[332] In hostile work environment cases, the "continuing violation" doctrine applies. This means that the statute of limitations clock is reset with each new violation, and a charge is timely "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period."[333] However, the U.S. Supreme Court recently held that in some disparate treatment cases (expressly not hostile work environment cases), the time period to file an EEOC charge runs from the date the first discriminatory act occurred.[334] Stated differently, "a Title VII plaintiff can only file a charge to cover discrete acts that 'occurred' within the appropriate time period."[335] Therefore, a subsequent manifestation of a discriminatory act, such as receiving a paycheck reflecting a discriminatory wage, does not necessarily become its own discriminatory act allowing for a new charging period. The *Ledbetter* decision and its progeny must be considered by any attorney examining when to file charges of discrimination with the EEOC. The employee should allege all relevant allegations of discrimination in the administrative claim otherwise such claims may be barred from a later civil complaint for failure to exhaust. The EEOC receives and investigates discrimination charges, makes reasonableness findings and may litigate on behalf of the charg-

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328 Note that the harasser must be plaintiff employee's *own* supervisor and that the employee can assert affirmative defenses to avoid liability. *Meritor Sav. Bank*, 477 U.S. 57 (1986).

329 Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (finding that the employer did not authorize, acquiesce to, or ratify the supervisor's discriminatory conduct and therefore, did not violate Title VII).

330 42 U.S.C. § 2000e-3(a) (2008); *see also* Miller v. Fairchild Industries, Inc., 797 F. 2d 727 (9th Cir. 1984) (discussing the *prima facie* case of retaliation under Title VII).

331 EEOC v. Crown Zellerbach Corp., 720 F. 2d 1008, 1013 (9th Cir. 1983).

332 42 U.S.C. § 2000e-5(e) (2008).

333 National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002); *cf.* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. —, 127 S. Ct. 2162, 2175 (2006) (in a hostile work environment case, "the actionable wrong is the environment, not the individual acts that, taken together, create the environment.").

334 *Ledbetter*, 127 S.Ct. at 2177.

335 *Id.* at 2169 (internal citations omitted). The Court, however, distinguished between "paychecks using a discriminatory pay structure" which would create a new charging period, and "paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied." *Id.* at 2174 (internal citations omitted).

ing party. If the EEOC determines that there is no cause for a discrimination finding, the agency will issue a "dismissal without particularized findings" determination and the charging party should request a Right to Sue Letter, which is required before the employee can file suit against the employer in court.[336] If the EEOC finds possible discrimination, the agency will informally attempt to negotiate a settlement with the employer. The EEOC may file a civil suit on behalf of the employee if the agency is unable to successfully negotiate an agreement, or it may issue a Right to Sue Letter to the employee authorizing a civil claim to be filed in court. The employee has 90 days to file a lawsuit after receipt of the Right to Sue Letter from the EEOC.[337]

F. Damages

An employer in violation of Title VII is liable for the employee's back pay and front pay as well as compensatory and punitive damages and attorneys' fees and costs.[338] However, in trafficking contexts where the worker may have undocumented immigration status, back pay and front pay recovery may be limited.[339]

Compensatory[340] and punitive damages for disparate treatment or intentional discrimination under Title VII are awarded pursuant to the Civil Rights Act of 1991.[341] Title VII has damages "caps," which limit the amount of compensatory and punitive damages that an employee can recover.[342]

VIII. 42 U.S.C. § 1981

42 U.S.C. § 1981 is an additional discrimination cause of action. Section 1981 prohibits discrimination in the making, performance, modification, and termination of contracts, including enjoyment of all benefits, privileges, terms and conditions of contractual relationships, as well as terms and conditions of employment. The statute covers discrimination only on the basis of race.[343] This, in some circumstances, may also be extended to discrimination based on national origin.[344]

Section 1981 permits recovery of unlimited compensatory and punitive damages. Furthermore, it does not have the procedural filing requirements of Title VII and has a longer statute of limitations.[345] It also allows a finding of liability against a defendant in his or her individual or personal capacity, which is not available under Title VII.[346] Still, where section 1981 claims are brought arising out of the same facts as a Title VII claim, "[t]he elements of each cause of action have been construed as identical."[347] Section 1981 also allows for attorney's fees and costs.[348]

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336 *Id.* at § 2000e-5(b).

337 It is important to check with the state version of the employment discrimination law statute because the statute of limitations in most states is often longer than that for the claims filed with the EEOC.

338 42 U.S.C. § 2000e-5(k) (2008).

339 *See* Chapter 3, § V(H), *supra* (describing the impact of *Hoffman Plastics* on FLSA coverage for undocumented workers.)

340 Compensatory damages may be available for other costs incurred as a result of the discriminatory act in addition to back pay, front pay and pre-judgment interest, such as medical expenses and emotional distress.

341 42 U.S.C. § 1981(a) (2008).

342 The maximum damage awards are: 1) 15-100 employees = $50,000; 2) 101-200 = $100,000; 3) 201-500 = $200,000; 4) 500 + employees = $300,000. *Id.* at § 1981. Please see the next section on 42 U.S.C. § 1981 for more information.

343 *Id.* at 1981(b).

344 *Chellen*, 434 F. Supp. 2d at 1104.

345 *Id.* at 1103 ("[B]ack pay and lost benefits [could be recovered] for an unlimited period of time.").

346 *Id.* at 1107.

347 *Id.* at 1103 (quoting Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988)).

348 42 U.S.C. § 1988.

IX. KU KLUX KLAN ACT OF 1871[349]

A claim may be brought under a provision of federal law emerged out of the Conspiracy Act of 1861[350] that was amended into its current form in the Ku Klux Klan Act of 1871[351] for the purpose of enforcing Fourteenth Amendment protections. It provides as follows:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, ... [and] ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[352]

The U.S. Supreme Court has found that this provision allows for a private right of action.[353] What constitutes "class-based" discriminatory animus is an area of hot debate in the Courts. In the trafficking context, one court allowed a plaintiff to bring a section 1985(3) claim motivated by defendants' "desire to deprive Plaintiff [of] her rights to be free from slavery as a direct result of Plaintiff's being an alien, female, and of African decent."[354] However, another court found that "recent immigrants, including undocumented persons" was not a "class of persons" subject to the protections of this Act.[355] The Court relied on Third Circuit precedent indicating that the court should examine, *inter alia*, "the immutability of, or the person's 'responsibility' for, the particular trait."[356] The Court found that the members of the defined class bear responsibility for their status.[357]

X. INTENTIONAL TORTS AND NEGLIGENCE

Tort claims provide compensatory damages for the distress suffered by the employee, as well as punitive damages meant to punish the employer. The statute of limitations for common law torts in many states is *one year*. Since some human trafficking cases lead to successful criminal prosecutions, analogous torts may not have to be proven under the doctrine of collateral estoppel. However, the absence of a criminal trial should not deter your client from pursuing tort claims. In civil cases, the burden of proof is a preponderance of the evidence, which is a lower standard to meet than the burden of beyond a reasonable doubt in the criminal context. Please note that tort law is extremely varied depending on jurisdiction. You should consult your jurisdictions application of tort laws. The following are torts that frequently occur in human trafficking situations.

A. Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress ("IIED") involves:

- extreme and outrageous conduct by the defendant or the defendant's agent;

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349 *Id.* at § 1985(3).

350 Conspiracy Act of 1861, ch. 33, 12 Stat. 284 (codified as amended at 42 U.S.C. § 1985(3)).

351 Act to Enforce the Provisions of the Fourteenth Amendment, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3)).

352 42 U.S.C. § 1985(3).

353 *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993).

354 *See* Deressa v. Gobena, No. 05 Civ. 1334, 2006 U.S. Dist. LEXIS 8659, at *16-17 (E.D. Va. Feb. 13, 2006). As noted earlier, *see* Chapter 3, § II(B), *supra*, Plaintiff in this case also used § 1985(3) as a mechanism to allege a cause of action for violations of the Thirteenth Amendment and 18 U.S.C. § 1584. *Id.* at *13-14.

355 *See* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 317-20 (D.N.J. 2005).

356 *Id.* at 319 (citing Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997)).

357 *See Zavala* at 319-20.

- intent to cause, or the reckless disregard of causing, emotional distress;
- severe or extreme emotional distress suffered by the plaintiff; and
- actual or proximate cause between the conduct and the distress.[358]

Most states recognize IIED without requiring the victim to suffer physical manifestations of mental distress. "Extreme and outrageous" conduct is not clearly defined, however, mere rudeness or inflammatory behavior is not sufficient.[359] The relationship between the plaintiff and the defendant is important. For example, continuous mocking or harassment by an employer toward an employee is more likely to be characterized as outrageous rather than taunting among equals.[360]

B. False Imprisonment

The following generally are elements of false imprisonment:

- nonconsensual, intentional confinement of the plaintiff;
- no lawful purpose; and
- confinement for an appreciable length of time, no matter how short (can be 15 minutes).[361]

Confinement can take several different forms: physical barriers; force or threat of immediate force against the plaintiff, his or her family, or others in plaintiff's immediate presence or property; omission when the defendant has a legal duty to act; or improper assertion of legal authority. If a physical barrier is used to restrain the plaintiff, it must surround the plaintiff in all directions so that there is no reasonable means of escape.[362]

In the trafficking context, one Court found that the plaintiff had sufficiently pled a false imprisonment claim even though the plaintiff at one point had a key to the residence while her traffickers were abroad. The Court found that the defendants' "threats of arrest and prosecution and [plaintiff's] fear of the [defendants] effectively imprisoned her on these occasions."[363] In another case, the Court found that the plaintiffs had sufficiently pled false imprisonment claims where defendant Wal-Mart allegedly locked them into their stores at night.[364] The Court also discussed — without reaching any conclusion — the question of whether threats of deportation themselves can sufficiently support a claim of false imprisonment.[365] Yet another court found that an individual defendant had falsely imprisoned the plaintiffs through a combination of physical confinement and threats.[366]

C. Assault

The following are elements of assault:

- act intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
- reasonable apprehension of such injury by the plaintiff (actual contact not required).[367]

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358 *See generally* Restat 2d of Torts, § 46; Lopez v. City of Chicago, 464 F.3d 711, 720 (7th Cir. 2006).

359 *See, e.g.*, Toro v. Arnold Foods Co., Case No. 3:07-CV-1356, 2008 U.S. Dist. LEXIS 66043, *10-11 (D. Conn. Aug. 28, 2008).

360 *See, e.g.*, Patterson by Patterson v. Xerox Corp., 901 F. Supp. 274, 279 (N.D. Ill. 1995).

361 *See, e.g.*, Fermino v. Fedco, 7 Cal. 4th 701 (Cal. 1994); Lyons v. Fire Ins. Exchange, 161 Cal. App. 4th 880, 888 (Cal. App. 2d Dist. 2008). The specific elements of false imprisonment vary between states.

362 *Id.*

363 *See Deressa*, 2006 U.S. Dist. LEXIS 8659, at *14-15.

364 *See Zavala*, 393 F. Supp. 2d at 334-35.

365 *Id.* at 332-35.

366 *See Chellen*, 446 F. Supp. 2d at 1274-75, 1291 (in trafficking case, acknowledging that words and conduct inducing a plaintiff to believe that "resistance or physical attempts to escape ... would be useless and futile" are sufficient to constitute false imprisonment).

367 *See generally* Restat 2d of Torts, § 21.

Intent needs to be proven. The defendant must desire or be substantially certain that the plaintiff will apprehend harm or offensive contact.[368] Furthermore, the plaintiff must actually perceive the harm or offensive contact and the apprehension perceived must be imminent.[369] Mere words alone do not suffice for an assault claim.[370]

D. Battery

The following are elements of battery:

- the acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact; and
- an offensive [or harmful] contact with the person of the other directly or indirectly results.[371]

Battery is actionable even in trivial physical contacts so long as they are harmful or offensive and without consent.

E. Fraudulent Misrepresentation

The following are elements of fraudulent misrepresentation:

- a misrepresentation (falsity, concealment, or nondisclosure);
- defendant knew of or consciously disregarded the statement's falsity;
- defendant intended to induce the plaintiff's action in reliance on the representation;
- plaintiff reasonably relied on the representation to his or her detriment; and
- plaintiff suffered damages.[372]

The misrepresentation must be of a past or present material fact. Material fact is defined as information of importance to a reasonable person or where the defendant knows that the victim attaches importance to the fact in question. A representation that is technically true but conveyed to deceive a person constitutes a misrepresentation. A misrepresentation also occurs when the defendant has a duty to disclose but does not. In assessing the reasonableness of the plaintiff's reliance on the misrepresentation, the court will take into account his or her particular qualities as well as the circumstances surrounding the case.

If you are making claims of fraudulent misrepresentation in your Complaint, you should keep in mind the Fed. R. Civ. P. 9(b) requires that such allegations be pled with particularity.[373]

F. Negligence

Negligence is used when intention cannot be proven. It involves:

- **Duty**: a legally recognized relationship between the parties.
- **Standard of Care**: the required level of expected conduct.
- **Breach of Duty**: failure to meet the standard of care.
- **Cause-in-Fact**: plaintiff's harm must have the required nexus to the defendant's breach of duty.
- **Proximate Cause**: there are no policy reasons to relieve the defendant of liability.
- **Damages**: the plaintiff suffered a cognizable injury.[374]

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368 *See generally* Restat 2d of Torts, § 32.

369 *See generally* Restat 2d of Torts, § 24.

370 *See generally* Restat 2d of Torts, § 31.

371 *See, e.g.*, White v. Muniz, 999 P.2d 814, 816 (Colo. 2000) (quoting Restat 2d of Torts, § 13).

372 *See, e.g.*, Me. Eye Care Assocs., P.A. v. Gorman, 2008 ME 36, P12 (Me. 2008); *Chellen*, 446 F. Supp. 2d at 1290.

373 *See, e.g.*, Circle Group Internet, Inc. v. Fleishman-Hillard, Inc., 231 F. Supp. 2d 801, 803 (N.D. Ill. 2002) (citing Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999)).

374 *See* John L. Diamond et al., Understanding Torts (2d ed. 2002).

G. Negligent Infliction of Emotional Distress

Unlike the tort of intentional infliction of emotional distress, negligent infliction of emotional distress does not require a showing of outrageous conduct as a *prima facie* element.[375] However, there is authority to the contrary.[376] Basically, negligent infliction of emotional distress involves:

- Defendant should have realized (and was negligent in not realizing) that his or her conduct involved an unreasonable risk of causing emotional distress.
- Distress, if it were caused, might result in illness or bodily harm.[377]
- Requirement of physical injury: Courts have disagreed on whether actionable emotional distress must be accompanied by physical injury, with some holding that observable physical symptoms are required, and others holding that they are not.[378] In some cases, claimants may be required to demonstrate that the physical injuries occurred contemporaneously with or shortly after the incidents causing emotional distress.[379]

H. Trespass to Chattel and Conversion[380]

Trespass to chattel and conversion are two different intentional torts that protect personal property from wrongful interference. In many cases both torts may be applicable.

I. Trespass to Chattel

Trespass to chattel is the intentional interference with the right of possession of personal property. The defendant's acts must either:

- intentionally damage the chattel;
- deprive the possessor of its use for a substantial period of time; or
- totally dispossess the chattel from the victim.

There is no requirement that the defendant act in bad faith or intend to interfere with the rights of others. It is sufficient that the defendant intends to damage or possess a chattel, which is properly possessed by another.

Unlike conversion, the doctrine of transferred intent has traditionally been applied to trespass to chattel.

J. Conversion

The following are elements of conversion:

- There must be an intentional exercise of dominion and control over a chattel.
- This exercise of dominion and control must so seriously interfere with the right of another to control the chattel that the defendant may rightly be required to pay the other the full value of the chattel.

Only very serious harm to the property or other serious interference with the right of control constitutes conversion. Less serious damage or interference may still be considered trespass to chattel.

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375 Abston v. Levi Strauss & Co., 684 F. Supp. 152, 157 (E.D. Tex. 1987) (applying Texas law).

376 *See* Ericson v. City of Meriden, 113 F. Supp. 2d 276, 291 (D. Conn. 2000) (applying Connecticut law) (tort arises only where it is based upon conduct of the defendant that is egregious, outrageous, or done in an inconsiderate, humiliating, or embarrassing manner).

377 Peralta v. Cendant Corp., 123 F. Supp. 2d 65, 82 (D. Conn. 2000) (applying Connecticut law).

378 Observable physical injury is required: Freeman v. Kansas State Network, Inc., 719 F. Supp. 995, 1000 (D. Kan. 1989) (applying Kansas law); physical injury is not required: Kelley v. Schlumberger Tech. Corp., 849 F.2d 41, 44 (1st Cir. 1988) (applying Louisiana law); Benedict v. Gen. Motors Corp., 859 F.2d 921 at *9-10 (6th Cir. 1988) (applying Ohio law).

379 *Freeman*, 719 F. Supp. at 1000 (applying Kansas law).

380 *See* Diamond et al. at 20-24.

XI. CONTRACT CLAIMS

Victims of human trafficking may have contract claims for breach of written or oral contracts. The award of contract remedies precludes tort remedies in a majority of states, and therefore punitive damages regardless of the willfulness of the breach. It should be noted that contract law differs from state to state.

A. Breach of Written Contract

When there has been a written offer of employment that has been accepted by the trafficked client, and the trafficked person has not been paid the promised salary or given the promised job opportunity, a breach of a written contract is established.[381] If the offeror fails to deliver what is promised in the written contract, then the offeree may be entitled to expectation or reliance damages.

B. Breach of Oral Contract

An oral contract is very similar to an implied agreement between the traffickers and the trafficked persons. In order to establish an oral contract, it is necessary to first establish that there was an intent to offer by the traffickers, and second, that the terms of the offer are sufficiently certain and definite. However, the inability to establish that the terms of the offer were "certain" or "definite" does not in itself preclude that an oral contract has been made.[382]

C. Statute of Frauds

Generally, an oral contract is void if "by its terms [it] is not to be performed within one year."[383] The statute of frauds bar, however, may be overcome based on the "part performance exception and the doctrine of equitable estoppel."[384] In a trafficking case, the plaintiff defeated the defendants' summary judgment motion based on a statute of frauds defense. The plaintiff successfully argued that, based on her alleged facts, she would meet the partial performance exception because there was "a fraudulent oral promise by the defendant upon which the plaintiff justifiably relied by engaging in acts that are 'unequivocally referable' to the oral promise, resulting in substantial injury to the plaintiff."[385]

D. Breach of the Covenant of Good Faith and Fair Dealing

Within every contract, there is an implied covenant of good faith and fair dealing. This covenant is meant to allow the terms of the contract to be interpreted fairly. Therefore, what constitutes a breach of the covenant depends on the particular terms of the contract. Even though the covenant is essentially an implied contract term, courts have occasionally held that the breach of the implied covenant of good faith and fair dealing can also constitute a tort.[386] This allows for tort damages as well as contract damages.

E. Damages

Contract remedies are generally limited to compensatory damages of which the standard measure is expectation damages. Expectation damages are intended to place the victim of the breach in the position they would have been in if the promise had been performed. Future earnings or front pay may be recovered in the event of wrongful discharge and can substitute reinstatement, less any sum, which has been earned or could be earned through the plaintiff's duty to mitigate damages. As an alternative, reliance damages are based on the non-breaching party's costs and have the purpose of putting the non-breaching party back into the position they

381 *See, e.g.*, Williams v. Riverside Cmty. Corr. Corp., 846 N.E.2d 738, 745 (Ind. Ct. App. 2006).

382 *See, e.g.*, Clark v. Walker, Case No. 04 C 941, 2004 U.S. Dist. LEXIS 24046, *6-8 (N.D. Ill. Nov. 23, 2004).

383 Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *10 (S.D.N.Y. Dec. 3, 2003) (quoting N.Y. Gen. Oblig. Law § 5-701).

384 *Id.* at *11.

385 *Id.*

386 *See, e.g.*, Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173, 177-79 (Cal. 1967).

would have been in had the promise never been made.[387] For example, reliance damages can be losses incurred as a result of the worker's relocation due to the employer's false representations regarding the employment.

XII. QUASI-CONTRACT CLAIMS

Quasi-contractual obligations are imposed by the law for reasons of justice, as opposed to contractual obligations that are based on an agreement between parties.[388] Accordingly, the terms of the quasi-contractual obligation are often "determined by what equity and morality appear to require after the parties have come into conflict."[389] Quasi-contracts differ from express and implied contracts in that the former develops independent of the intention or promises of the parties and instead depends on the benefit conferred on the breaching party.[390] Quasi-contracts may give rise to rights in spite of the express refusal of a party.[391] In fact, "quasi-contract" is somewhat of a misnomer, as it is often a remedy in the form of restitution, rather than a contractual agreement.[392] Factors that are relevant to the court's determination of how to restore the parties to the *status quo* include: "the relative fault, the contractual risks assumed by the parties, any unjust enrichment or unjust impoverishment, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party."[393]

A. Unjust Enrichment

Unjust enrichment has been defined as "circumstances which give rise to the obligation of restitution, that is, the receiving and retention of property, money, or benefits which in justice and equity belong to another."[394] Under the principle of unjust enrichment, a plaintiff can recover in restitution if (1) the plaintiff has conferred a benefit on the defendant; (2) the plaintiff conferred the benefit with the expectation of being compensated for its value; (3) the plaintiff's expectation was known or should have been known to the defendant; and (4) allowing the defendant to avoid liability would unjustly enrich the defendant.[395]

In a recent farmworker trafficking case, the Court denied the defendant's motion to dismiss the plaintiffs' unjust enrichment claim.[396] Of note, the Court indicated that the defendant's claim that he paid sub-contractors for the plaintiffs' labor would not necessarily defeat an unjust enrichment claim, even if true.[397]

B. *Quantum Meruit*

Quantum meruit is a theory of recovery in the form of restitution.[398] The principle of *quantum meruit* has been defined as a "recovery in which one party to a contract sues the other, not on the contract itself, but on an implied promise to pay for so much as the party suing has done. If one party refuses to perform his part, the other may rescind and sue on a *quantum meruit*."[399] Generally, recovery in *quantum meruit* requires the following elements:

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387 ATACS Corp. v. Trans World Commc'ns, Inc., 155 F.3d 659, 669 (3d Cir. 1998) ("Where a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest by seeking to achieve the position that it would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance.").

388 Restatement (Second) Of Contracts § 4 cmt. b (1981).

389 Arthur Linton Corbin Et Al., Corbin On Contracts § 1.20 (Matthew Bender & Co. 2004).

390 Restatement, *supra* note 556.

391 Corbin, *supra* note 557.

392 Restatement, *supra* note 556.

393 Corbin, *supra* note 557.

394 Ballentine's Law Dictionary (3d ed. 1969).

395 Eisenberg, *supra* note 493, at s. 312.

396 Does v. Rodriguez, No. 06 Civ. 00805, 2007 U.S. Dist. LEXIS 15061, at *14-16 (D. Col. Mar. 2, 2007).

397 *Id.*

398 Restatement, *supra* note 556, at § 370 cmt a.

399 The Law Dictionary (Anderson Publ'g Co. 2002).

1) the performance of services in good faith,
2) the acceptance of the services by the person to whom they are rendered,
3) an expectation of compensation therefore, and
4) a determination of the reasonable value of the services rendered.[400]

XIII. OTHER STATE STATUTORY CLAIMS

It is imperative to research your state statutes for additional claims that may provide relief to your trafficked client. For example, in Maryland, courts have discretionary authority to award treble damages for wage and hour violations.[401] Connecticut law gives double damages for minimum wage, late payment, and other wage violations.[402] In California, an employee may be entitled to double damages if induced to move based on a misrepresentation regarding the terms of employment.[403] In addition, under section 17200 of the California Business and Professional Code, an unlawful, unfair, or fraudulent business act or practice can be challenged in court by any member of the public that may have been deceived. Remedies include restitution and disgorgement of wrongfully gained profits.[404]

400 Topo v. Dhir, No. 01 Civ. 10881, 2003 U.S. Dist. LEXIS 21937, at *9 (S.D.N.Y. Dec. 3, 2003) (in human trafficking lawsuit, cross-motions for summary judgment denied on, *inter alia, quantum meruit* claim), Report and Recommendation *aff'd* in relevant part 2004 U.S. Dist. LEXIS 4134, at *11-12 (S.D.N.Y. Mar. 15, 2004).

401 Md. Code Ann., Lab. & Empl. §§ 3-427, 3-507 (LexisNexis 2008).

402 Conn. Gen. Stat. § 31-72 (2008).

403 Cal. Lab. Code §§ 970, 972 (Deering 2007).

404 Cal. Bus. & Prof. Code §§ 17200, 17203, 17204 (Deering 2008); Bank of the W. v. Super. Ct. of Contra Costa County, 833 P.2d 545, 553 (Cal. 1992); People v. McKale, 602 P.2d 731, 733-34 (Cal. 1979); Consumers Union of U.S., Inc. v. Fisher Dev., Inc., 257 Cal. Rptr. 151, 154-55 (Cal. Ct. App. 1989); Stoiber v. Honeychuck, 162 Cal. Rptr. 194, 206-07 (Cal. Ct. App. 1980).

CHAPTER 4
DAMAGES

I. BACKGROUND

Damages are perhaps the most important aspect of the trafficked plaintiff's case. Whether received through a settlement or jury verdict, damages represent the final object of relief that plaintiffs are seeking through the lawsuit. Obtaining damages signify closure to the civil litigation and provide trafficking victims with the economic resources to move toward self-sufficiency.

II. PROCEDURE

A few general procedural rules apply to damages. First, the burden of proving the trafficked plaintiff's claims in civil cases also applies to proving damages. Generally, the plaintiff must prove by a preponderance of evidence that she has suffered and will in the future suffer the losses for which he or she seeks relief. In some jurisdictions, a claim for punitive damages may require a more stringent standard.

Second, the "single judgment rule" requires a one-time recovery for each claim brought in the civil case. This rule prevents subsequent litigation for prospective harms resulting from injuries claimed in the original lawsuit. Thus, both past and anticipated future losses for injuries should be pled at the same time.

Third, the damage award may take the form of a lump sum or divided into periodic payments. Lump sum awards require that predicted future losses are folded into one damage award along with past losses. Attorneys should carefully calculate their award recommendation to account for their clients' future economic needs and upon receipt of a lump sum award, advise their clients to invest wisely to generate favorable interest rates. The technicalities of calculating future damages to present day market values are described in the section on "Compensatory Damages."

The alternative recommended by some tort reformers is a judgment requiring periodic payments. Such payments can be adjusted over time to accommodate changing facts in the amount of losses suffered by the plaintiff, such as fluctuating medical bills. There are increased administrative costs associated with resolving disputes over the amount of the periodic payments and lump sum awards are far more common.

Periodic payments may also take the form of a structured settlement. This is a voluntary agreement between parties in which the plaintiff agrees to receive periodic payments over time. The structured settlement relieves the plaintiff of the management responsibility of investing the lump sum award and diminishes the possibility that the lump sum award is exhausted within a few years. However, with a structured settlement, the plaintiff will not control the distribution of money and if administered through an annuity company, annuities may not be indexed to current inflation rates.[1]

III. TYPES OF DAMAGES

The following section focuses on compensatory and punitive damages, which comprise the majority, if not all, of the trafficked plaintiff's damage award. Other types of damages are also briefly mentioned.

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1 *See generally,* Brown & Chalidze, *Structured Settlements: An Overview,* 22 Vt. B. J. & L. Dig. 14 (1996); Yandell, *Advantages & Disadvantages of Structured Settlements,* 5 J. Legal. Econ. 71 (Fall 1995).

A. Compensatory Damages

Compensatory damages are awarded as compensation, indemnity, or restitution for harm and are meant to restore the plaintiff back to his or her position before the injury occurred. There are two types of compensatory damages: economic and non-economic, also known as special damages or general damages, respectively. Economic or special damages consist of a plaintiff's out-of-pocket losses proximately resulting from the defendant's misconduct. Economic damages are theoretically tangible monetary losses most often including medical expenses and lost earnings. Non-economic or general damages are for a plaintiff's pain and suffering, loss of enjoyment of life, and other similar intangible losses.

Compensatory: Economic Damages

Any actual losses flowing directly from the plaintiff's injury that can be tangibly quantified are recoverable as economic damages. This includes, but is not limited to, lost earnings; medical expenses for physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; transportation; temporary housing costs; and child care expenses. To corroborate evidence of these losses, all receipts and affidavits attesting to these expenditures should be collected and recorded.

i. Lost Wages

The bulk of a trafficking victim's economic damages will consist of past and future lost wages.

The most common formula for calculating lost wages is the minimum wage and overtime standard set forth by the FLSA or the applicable state labor code. However, a prevailing wage standard may also be applied where the work involved, under normal circumstances, was entitled to a higher than minimum wage rate. For illegitimate or illegal work, such as prostitution, a court may adopt an alternative formula to compensate the victims based on the amount that the defendants profited off the forced labor or the lost income potential of the victims during the period of the forced labor.

Past wages are calculated by tabulating the hours worked and multiplying the number of hours with the wage and overtime rate. Other employer violations of federal or state labor law, such as failure to provide rest and meal breaks, accrue monetary penalties that can also be counted toward a plaintiff's actual damages.

Future wages may be awarded where the plaintiff's injury reduces his or her ability to perform his or her job, or renders him or her unemployed.[2] For trafficking victims, it can be argued that the harm of trafficking impairs the future earning potential the victims would have enjoyed had they remained in their countries of origin or had they entered the United States through appropriate channels. Thus, because of the trafficking, the victims' possibility of employment is hindered due to their unstable immigration status, and little to no social support within the United States.

ii. Calculating Future Losses

If a trafficked plaintiff is claiming future losses, whether based on lost earning power or prospective medical expenses, the calculation of such losses should be adjusted to the plaintiff's life expectancy, work life expectancy, and/or the expected duration of the plaintiff's injuries. In addition, the total amount of future losses must be discounted to present day value to factor in inflation and earned interest. Thus, the amount of future damages that a trafficked plaintiff is awarded today must comprise a lesser total dollar amount to account for prudent investing that would earn interest or appreciate in value over time.

With respect to discounting future wage loss to present day value, courts apply one of two methods: "total offset" or "real interest." The "total offset" method applies the same inflation

2 Sylvester v. Gleason, 371 N.W.2d 573, 575 (Minn.App. 1985).

rate for both general inflation and wage inflation.[3] The rationale behind this is that it achieves the same if not greater accuracy as assigning an inflation rate factor, while producing more predictable awards since juries won't be burdened with complex formulas.[4] Opponents to this method believe that the total offset method incorrectly assumes that price and wage inflation cancel each other out.[5] Therefore, the U.S. Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer* supported the "real interest" method, identifying the following elements to calculate future wage loss to present value: (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment.[6] The Court endorsed the real interest rate as the appropriate discount rate for a damage award, a number between 1% and 3%.[7] Ultimately, the approach taken in a given case will depend on that jurisdiction's precedent and the arguments of each party's attorneys and economic experts.

Compensatory: Non-Economic Damages

Non-economic damages primarily consist of pain and suffering, intended to compensate the plaintiff for the physical pain and mental suffering he or she has suffered as a result of his or her injuries. Physical pain is defined as the sensory pain experienced by the plaintiff from his or her injuries and from treatment of those injuries. Mental suffering includes the mental anguish resulting from physical injuries as well as non-physically induced emotional distress. Examples of emotional distress include worry, grief, anxiety, depression, and despair. Emotional distress also includes psychiatric disorders resulting from the defendant's misconduct, such as Post-Traumatic Stress Disorder (PTSD). Many trafficked plaintiffs suffer from PTSD, triggered by the trauma of the trafficking experience, resulting in various symptoms, such as insomnia, memory difficulties, and feelings of fear and panic. This type of emotional harm is compensable.[8] A plaintiff may establish evidence of pain and suffering through his or her own testimony as well as through the testimony of witnesses, such as medical and mental health practitioners and experts.

Courts have tended to avoid the use of well-defined guidelines to aid jurors in calculating the amount of pain and suffering damages.[9] Some commentators have argued that the absence of clear guidelines has produced arbitrary and unpredictable awards for equally severe injuries.[10] Some courts allow attorneys to make pain and suffering award recommendations, which greatly influence juries.[11] Therefore, presenting a clear and predictable formula for calculating damages may play a key role in how much the jury awards the trafficked plaintiff.

One approach to the calculation of pain and suffering damages is the "per diem" method.[12] This method places a daily monetary amount on the plaintiff's suffering and multiplies that amount by the number of days that the plaintiff has been injured and will remain injured in the future. Some courts have rejected the per diem method, including the Supreme Court of California, which characterized this method as mere conjecture and an excessive measure of damages.[13] Analysis of prior awards in similar cases may also provide some guidance on the determination of pain and suffering damages.[14] Finally, attorneys should be aware that many states have attempted to alleviate the unpredictability of damage awards through statutory reforms, such as caps on

3 Michael T. Brody, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U.Chi. L.Rev. 1003, 1022 (1982).
4 Kaczkowski v. Bolubasz, 421 A.2d 1027, 1038 (Pa. 1980).
5 Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983).
6 *Id.* at 537-38.
7 *Id.* at 548.
8 Newman & Yehuda, *PTSD in Civil Litigation: Recent Scientific and Legal Developments,* 37 Jurimetrics 257 (1997).
9 Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal. L.Rev. 773, 781 (1995).
10 *Id.* at 785.
11 Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 Psychol. Pub. Pol'y & L. 712, 714 (2000).
12 *Id.* at 782.
13 Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 347 (Cal. 1961).
14 James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale.J. on Reg. 171, 172 (1991).

pain and suffering damages. Attorneys should verify whether such a cap exists in their jurisdiction and calculate damages accordingly.

B. Punitive Damages

Punitive damages are awarded to punish and deter egregious conduct.[15] Traditionally, only the most outrageous intentional conduct warranted the application of punitive damages. Now, many states have expanded the award of punitive damages for a range of misconduct. For example, in California, a plaintiff may recover punitive damages where the defendant is found "guilty of oppression, fraud, or malice, express or implied."[16] In a similar vein, Oregon allows punitive damages "to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future."[17] Though states vary in their standards for punitive damages, generally all states require behavior more egregious than negligence.

Procedure

The assessment of punitive awards calls for specific procedural rules. Some courts and legislatures have increased the burden of proving punitive damages from a preponderance standard to a clear and convincing standard[18] and in some states, proof beyond a reasonable doubt.[19] Some states have also implemented bifurcated proceedings to determine whether defendants are liable for punitive damages. In a bifurcated system, there are two trial segments. Defendants must first be found to have committed a tort or other injury and the compensatory damages assessed against them. Only then is the jury to consider punitive damages.[20] Finally, many states have enacted statutory caps to limit the amount of punitive awards.

Ratios

In making recommendations for the amount of punitive damages, it is worth noting that the U.S. Supreme Court has provided certain parameters to prevent overly excessive punitive awards.[21] The *Gore* guideposts include the reprehensibility of the defendant's conduct, the ratio of punitive damages to actual and potential compensatory damages, and sanctions for comparable conduct.[22] In *State Farm Insurance Company v. Cambell*,[23] the Court specified the second factor, holding that the relationship between punitive and compensatory damages should be a single digit ratio. Thus, a punitive award nine times greater than the compensatory award may be considered excessive and an unconstitutional violation of a defendant's due process rights. Influenced by the *Gore* decision, many state courts apply the principal that punitive damages should bear a "reasonable relationship" to compensatory damages and sometimes even provide a specific ratio of punitive to compensatory damages.[24] Though the *Gore* guideposts do not provide an exact formula for ascertaining the correct amount of punitive damages, they are nonetheless helpful to gauge whether an attorney's estimate is within the scope of what is a "legitimate" award.

Defendant's Wealth

In many states, including California, the defendant's wealth is also factor in determining the amount of a punitive damage award.[25] Considering the defendant's wealth facilitates achieving the optimal level of deterrence — that is, the amount of punitive damages that discourages the defendant's future wrongful conduct,

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15 A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L.Rev. 869, 878 (1998).

16 Cal. Civ. Code § 3294 (2008); N.D. Cent. Code § 32-03.2-11 (2008).

17 Oberg v. Honda Motor Co., Ltd., 851 P.2d 1084, 1095 (Or. 1993).

18 *See* Lee R. Russ, *Annotation, Standard of Proof as to Conduct Underlying Punitive Damage Awards — Modern Status*, 58 A.L.R. 4th 878 (1987).

19 Colo. Rev. Stat. § 13-25-127.

20 Cal. Civ. Code § 3295 (d); N.C. Gen. Stat. § 1D-30.

21 BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

22 *Id.* at 575.

23 538 U.S. 408 (2003).

24 A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L.Rev. 869, 878 (1998).

25 Kelly v. Haag, 145 Cal. App. 4th 910 (App.Ct. 2006).

while not being overly burdensome.[26] The plaintiff may have the burden of establishing the defendant's financial condition[27] and providing "the entire financial picture" of the defendant, including assets and liabilities, in order to justify a punitive award.[28] For a trafficked plaintiff, establishing the defendant's "entire financial picture" is difficult to accomplish where the wealth and debt of traffickers is hidden and unidentifiable. In other states, however, the defendant's wealth is not considered essential in the determination of a punitive award and may only be considered if the defendant appeals the punitive judgment.[29] Attorneys should therefore, consult the rules of their jurisdiction to strategize the calculation and granting of punitive awards to their trafficked clients.

Vicarious Liability for Punitive Damages

In many trafficking cases, plaintiffs seek to impose punitive damages on third party employers whose employees served as the primary agents for the trafficking violations. There are various jurisdictional approaches to this issue. Some courts allow claims for punitive damages to flow to employers for the misconduct of their employees based on a vicarious liability theory.

Other states implement a more stringent standard. For example, in California, an employer is liable for punitive damages based on the actions of an employee if "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of other or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." With respect to corporate employers, California law further requires that the "advance knowledge" and "conscious disregard" be on the part of the corporation's "officer, director, or managing agent."[30]

Still, other states follow the Second Restatement, which states that punitive damages can be awarded against "a master or other principal because of an act by an agent," if:

A) the principal or managerial agent authorized the doing and the manner of the act, or
B) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
C) the agent was employed in a managerial capacity and was acting in the scope of employment, or
D) the principal or a managerial agent of the principal ratified or approved the act.[31]

C. Nominal Damages

Nominal damages (e.g., $1) are symbolic damages to establish the rights of the plaintiff and/or to clarify that defendant committed the wrongful act. Nominal damages are usually awarded when the violation is established but no actual harm occurred or was proven with certainty.

D. Injunctive and Other Equitable Relief

Prohibitory injunctions order the defendant to refrain from certain activities while mandatory injunctions order the defendant to perform a particular act. Other types of equitable relief include restitutionary remedies, such as a constructive trust or equitable lien.

26 *Id.* at 914-15.
27 *Id.* at 916.
28 *Id.* at 915-17.
29 Hall v. Wal-Mart Stores, Inc., 959 P.2d 109, 112 (Utah 1998).
30 Cal. Civil Code § 3294(b).
31 Restatement (Second) of Torts, § 909 (1965).

E. Liquidated Damages

Liquidated damages are the amount predetermined by the parties to a contract as the total compensation to an injured party should the other party breach the contract. Liquidated damages may also be set by statute, as with the FLSA, to remedy a breach of that statute.

F. Statutory Damages

Some state and federal labor and civil rights statutes allow for an award of statutory damages. This is usually a fixed amount (e.g., $1,000), or a maximum amount (e.g., up to $1,000) that either is automatically awarded, or that may be awarded instead of actual damages where actual damages are difficult to quantify.

G. Pre-Judgment Interest

In several circuits, pre-judgment interest is available on back pay awards if liquidated damages are not awarded.[32] Courts differ on how to calculate prejudgment interest. Some courts base pre-judgment interest rate calculations on federal post-judgment interest rates calculated from the date the judgment is entered, "at a rate equal to the weekly average one-year constant maturity treasury yield."[33] Other courts have calculated the pre-judgment interest rate based on the prime rate from the date of injury to the date of judgment.[34] Yet other courts utilize the state pre-judgment interest rate.[35]

H. Attorneys' Fees and Costs

The costs of litigation and the prevailing party's reasonable attorneys' fees may be awarded.

IV. INSURANCE

A. Collateral Source Rule

The traditional collateral source rule provides that payments received by the plaintiff for his or her injuries, from other sources, such as health insurance, public benefits, or charity, are not admissible in a civil action to reduce the defendant's obligation to pay damages. Thus, a plaintiff is still entitled to the full amount of compensation from a liable defendant, regardless of the compensation the plaintiff may have obtained from "collateral sources." The rule is intended to prevent an unfair windfall to the defendant for the plaintiff's prudence in obtaining health insurance and/or the goodwill of charity in assisting the plaintiff's needs. Approximately half of the states have eliminated the rule or restricted its application for specific claims, mostly in the context of medical malpractice and claims against public entities. Generally, the traditional rule will apply to trafficked plaintiffs receiving benefits and donations for their injuries — such compensation will NOT offset the amount of damages assessed against the defendant. However, damages against the defendant will be offset by the defendant's payment of direct benefits to the plaintiff, intended as compensation for the plaintiff's injuries.

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32 Some appellate courts have held that pre-judgment interest for back pay awards under the FLSA is mandatory, *see* Usery v. Associated Drugs, Inc., 538 F.2d 1191, 1194 (5th Cir. 1976); McClanahan v. Mathews, 440 F.2d 320, 326 (6th Cir. 1971), or should be presumed to be appropriate, *see* Brock v. Richardson, 812 F.2d 121, 126-27 (3d Cir. 1987); Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 57-58 (2d Cir. 1984); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 183 (8th Cir. 1975); *cf.* Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th Cir. 1969) (finding district court's denial of pre-judgment interest was not an abuse of discretion). *But see* Clougherty v. James Vernor Co., 187 F.2d 288, 293-94 (6th Cir. 1951), *cert. denied*, 342 U.S. 814 (1951) (denying pre-judgment interest).

33 28 U.S.C. § 1961 (2008). *See, e.g.,* Lefevre v. Harrison Group, Civil Action No. 95-1529, 1996 U.S. Dist. LEXIS 9483 at *3 (E.D. Pa. July 8, 1996).

34 *See, e.g.,* Cement Div., Nat'l Gypsum Co. v. City of Milwaukee, 144 F.3d 1111, 1114-15 (7th Cir. 1998) (finding the prime rate appropriate for calculation of pre-judgment interest); Donovan v. Dairy Farmers of Am., 53 F. Supp. 2d 194, 197-98 (N.D.N.Y. 1999) (awarding prejudgment interest from the date of the injury).

35 *See, e.g.,* Baker v. John Morrell & Co., 266 F. Supp. 2d 909, 949 (N.D. Iowa 2003).

B. Homeowner's Insurance as an Additional Source of Recovery

If a defendant trafficker owns a home, his or her homeowner's insurance policy may be a source of recovery for the trafficked plaintiff. Homeowner's insurance policies generally include both first-party and third-party liability provisions. These policies protect the policyholder against damage to the home, as well as injuries to third parties resulting from conduct in which the policyholder is found to be at fault. The personal liability provision in homeowner's insurance policies generally extends injuries that occur both within and outside of the home. Homeowner's insurance, in some cases, may provide up to $500,000 in coverage, providing trafficked plaintiffs with a deep pocket, protection against defendants declaring bankruptcy, and protection against defendants depleting their assets.

The key to triggering coverage of a trafficker's homeowner's insurance policy is to plead claims that are explicitly enumerated in the policy itself. The claim most often found in these policies is "negligence," providing protection for accidental injuries to third parties that occur within the home and injuries caused by the policyholder's unintentional conduct outside the home. However, some policies also protect against "false imprisonment," and "invasion of privacy." Early discovery of the trafficker's insurance policy will determine the range of claims and the extent of the trafficker's personal liability coverage.

If the policy does indeed cover a claimed injury, the trafficked plaintiff's attorney should ensure that defense counsel has provided the complaint to the insurer. It may be possible at this point to settle with the insurer within the monetary limits of the policy coverage. If a settlement cannot be reached, litigation against both the trafficker and the insurer is a possibility.

V. TAX CONSEQUENCES

Damage awards received by trafficked plaintiffs will have tax consequences. For example, damages granted for lost wages are treated as income and therefore, taxable earnings. Punitive damages are also considered taxable gross income.

The tax treatment of compensatory damages for personal injuries was traditionally separated into two categories, physical injuries and non-physical injuries. Compensatory damages for physical injuries enjoyed tax exemption pursuant to United States Revenue Code section 104 (a), while emotional distress damages received no tax benefit. However, a recent D.C. Circuit case, *Marrita Murphy and Daniel J. Leveille v. Internal Revenue Service and United States of America*,[36] held section 104 (a)(2) unconstitutional insofar as it allowed the taxation of compensatory damages for a non-physical injury that was unrelated to lost wages or earnings. The D.C. Circuit ruled that the complainant was owed the taxes that she paid on her damage award plus applicable interest. Thus, this opinion indicates some movement toward expanding tax exemption to pure emotional distress damages, which would benefit trafficked plaintiffs who suffered tremendous emotional harm, but not physical injury.

Tax rules are complex. To learn more about how tax regulations will impact the damage award in a trafficking case, it is imperative to seek the advice of a tax expert.

VI. PUBLIC BENEFITS

Depending on the amount of the damage award received by the trafficked plaintiff, government benefits he or she is receiving, such as health insurance, food stamps, and low-income housing may be affected.

36 493 F.3d 170 (2007).

In general, tort payments, including worker's compensation, are not exempt from the calculation of eligibility for government benefits unless they are codified as exempt in benefits' or other related statute. For example, tort compensation relating to federal Holocaust Reparations is exempt from the calculation of eligibility for some public benefits. A worthy pursuit for those in any state would be to lobby for the legislative codification of the refugee and government benefits of those receiving tort payments from civil human trafficking cases.

Two important features of the damage award will impact a trafficked plaintiff's eligibility for public benefits: the method of payment and the amount of damages. For example, small periodic payments of a damage award may preserve the trafficked plaintiff's eligibility for certain benefits. However, it may be in the interest of the plaintiff to receive a larger lump sum award, forego benefits for a period of time, and reapply for them when he or she is in need. To strategize the continued receipt of benefits in light of a damage award, consult public benefits attorneys. The Western Center on Law and Poverty (www.wclp.org) provides a general manual on how to approach public benefits issues.

A Practitioner's Manual for Migrant Workers:

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Justice Without Borders

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First Edition

Authored and Edited by
Douglas MACLEAN
Executive Director

Charmaine YAP
Misa MITSUGI
Sanjana JAYARAMAN
Stephanie TEH
Pro Bono Research Fellows
Justice Without Borders

Sheila HAYRE
Senior Lecturer
National University of Singapore
Faculty of Law

With Additional Research and Writing by
LIM Wei Zhen
NGUYEN Vu Lan
Pro Bono Research Fellows
Justice Without Borders

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PREFACE

Migrant workers are among the most common international travellers in the region. And yet, for all of the work by civil society, national governments, and international organisations to improve their migration and working conditions, access to justice remains a frustratingly domestic idea, limited to the jurisdiction they happen to find themselves in.

This manual seeks to address this glaring gap in service provision within Singapore, one of the most popular destinations for migrant workers from across Asia. By creating a guide to the legal options available to those who cannot remain in Singapore to pursue their claims, we seek to make it easier for advocates to help victims of labour exploitation or human trafficking seek just compensation against their abusers, even after going home. We also hope additional civil cases will send a message to bad employers and brokers, who sadly exist in every country, that they can no longer use a worker's departure to flout Singapore law and avoid responsibility.

A note on audiences: this manual was designed for Singapore lawyers, Singapore direct service providers, and counterpart lawyers and entities in the clients' home countries. For lawyers who are new to migrant worker issues, this manual provides an overview of common legal problems that migrant workers face on the job. For Singapore direct service providers, this manual can serve as a screening tool, helping paralegals and other staff identify potential claims prior to seeking a consultation with a lawyer. Finally, lawyers and service providers in clients' home countries can use this manual to make an initial assessment of possible Singapore-based claims, and weigh the pros and cons of attempting to bring legal action from abroad.

Finally, this manual is a work in progress. Many of the issues we have sought to address involve novel questions of law that the courts have not answered. The logistical hurdles involved in cross-border pro bono litigation are also not fully understood. As such we gladly welcome your feedback on how we can improve this document. Please feel free to e-mail us at the address below with your input.

Douglas MacLean
Executive Director
Justice Without Borders
maclean@forjusticewithoutborders.org

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An Introduction to Singapore's Migrant Workers

by Sheila Hayre, National University of Singapore

CHAPTER 1: AN INTRODUCTION TO SINGAPORE'S MIGRANT WORKERS

1. INTRODUCTION

1.1. This chapter provides a general overview of migrant workers in Singapore to help lawyers work more effectively with migrant worker clients. It first describes the historical, social, and political context that migrant workers encounter when they come to Singapore to work. It then offers some background information and a cross-cultural framework for working effectively with migrant workers as clients. Section 2 discusses the meteoric rise of Singapore's economy since the country's independence nearly fifty years ago, and its resulting reliance on skilled and unskilled foreign workers to fuel this growth. Section 3 introduces a few basic concepts central to understanding the migrant worker context in Singapore, including the unique status of foreign domestic workers; the government bond as contrasted with the levy system; and the non-portability of the work permit. The chapter closes with a tutorial on techniques for cross-cultural advocacy when working with migrant workers.

2. A BRIEF HISTORY OF SINGAPORE FOR NON-SINGAPOREANS

I. The Singapore miracle

2.1. Singapore is a densely populated city-state, a tiny island of only 604 square kilometres, just off the southern tip of Malaysia.[1] Its population is approximately 5.4 million, with non-resident foreigners comprising over 1.5 million and permanent residents comprising approximately half a million, totalling almost 39% non-Singaporeans.[2]

2.2. For those unfamiliar with Singapore's history, the city-state gained independence from Malaysia in 1965. At the time, Singapore seemed to face a bleak economic future. Yet, in just a few decades, Singapore had reinvented itself, undergoing immense political and economic changes, transforming itself from a developing country into one of the wealthiest countries in the world. "Under Lee Kuan Yew, Prime Minister from 1959 to 1990, the country grew and prospered as a powerhouse of light industry and high technology," with an economy characterized by "government efficiency, exceptional infrastructure, minimal corruption, and a skilled workforce."[3] Today, Singapore is by far the wealthiest nation in Southeast Asia. Much of this prosperity can be attributed to foreigners and foreign labour.

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[1] Population and Land Area, Yearbook of Statistics Singapore, Jan. 2014.

[2] Eugene KB Tan, "Managing Female Foreign Domestic Workers in Singapore: Economic Pragmatism, Coercive Legal Regulation, or Human Rights?" (2010) 43 Israel Law Review 99 at 103.

[3] *Malaysia and Singapore*, (London, UK: Penguin 2010) at 45.

II. Early immigration to Singapore and Singapore's demographics today

2.3. As early as 1819, Singapore was developing into a vibrant "hub of maritime commercial activities" where English traders, Chinese merchants, and Indian, Arab, and Malay traders, among others, converged.[4] "From the beginning, Singapore drew settlers from across the globe: Arabs, Armenians, Bugis, Chinese, Europeans, Indians, Javanese, and Malays."[5] By 1891, however, "the Chinese accounted for 67 per cent of the island's population, compared with the Malays at 20 per cent and the Indians at 9 per cent."[6]

2.4. Today, the overwhelming majority of Singaporeans are of Chinese descent (approximately 77%), while 14% are Malay, and 7.6% Indian, and with the remaining one-percent consisting mostly of Eurasians and Western expats.[7] Nonetheless, today's Singapore is a multicultural society in which the state actively promotes racial harmony and integration.[8] While English is the primary language of Singapore, the government recognizes four official languages to promote national unity and national identity, including Malay, Mandarin Chinese, and Tamil. Many Singaporeans speak one of these three languages, in addition to English. Religion is also freely practiced, and a plethora of religions exist in Singapore.[9]

III. Foreign labour, including migrant workers

2.5. Out of necessity, Singapore continues to be a country of foreigners. "Because of persistent below-replacement fertility rates since 1975, Singapore has relaxed its immigration policies in order to attract foreigners to contribute to the

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[4] Kwa Chong Guan, Derek Heng, & Tan Tai Yong, *Singapore: A 700-Year History: From Early Emporium to World City* (Singapore: National Archives of Singapore, 2009), at 79-82.

[5] Chris Lydgate, *Lee's Law: How Singapore Crushes Dissent*, (Melbourne: Scribe Publications, 2003), at 11.

[6] *Ibid.* (citation omitted).

[7] *Malaysia and Singapore* (London, UK: Penguin 2010) at 199. See generally Saw Swee-Hock, *The Population of Singapore*, 3d ed (Singapore: Institute of Southeast Asian Studies, 2012), at 55-79. Singaporeans of Chinese descent are quite diverse and speak Hokkien, Teochew, Cantonese, Hainanese, Hakka, and others. By contrast, most of Singapore's Indians come from South India and speak Tamil. See, e.g., Bilver Singh, Politics and Governance in Singapore: An Introduction, 2d ed (Singapore: McGraw-Hill Education, 2012), at 115-16.

[8] "Since the racial riots of the 1960s, society had been considerably harmonized, with the government making every effort to keep it so." Malaysia and Singapore (London, UK: Penguin 2010) at 199; see also Bilver Singh, *Politics and Governance in Singapore: An Introduction*, 2d ed (Singapore: McGraw-Hill Education, 2012), at 126 ("When Singapore gained independence in 1965, the PAP government adopted cultural democracy as the founding principle of the new state. The government realised that it was difficult to cultivate a common Singaporean identity and culture, because all the racial communities had distinct identities, language and cultures. As the different ethnic values could not be shed just to for a homogenous national identity, the government utilized a strategy to accommodate the unique characteristics of every ethnic group by building on the strengths of ethnic diversity in order to maintain social and national stability; it would maintain the nation as multi-racial, multi-cultural, multi-lingual, and multi-religious.").

[9] Buddhists accounts for 33.3%; Muslims 14.7%; Christians 18.3%; Taoists 10.9%; Hindus 5.1%; and all others less than 1%. *Malaysia and Singapore* (London, UK: Penguin 2010) at 45.

maintenance of a high level of economic expansion and to the growth of the population when they become permanent residents, and subsequently citizens […]"[10] The contributions of immigrants and migrants to Singapore's economy cannot be denied: in the 1990s, foreign workers contributed 3.2 percentage points to the annual GDP growth rate of 7.8%."[11]

2.6. Thus, due to its rapid economic growth, declining birth rate, and aging population, Singapore has been forced to rely heavily on "a controlled and revolving pool of foreign labour" to supplement its local workforce.

> Since Singapore began importing foreign workers in the 1960s, the percentage of non-resident populace has been growing steadily.… Recruitment was selective; in the early years it was confined to Malaysia. Since the early 1980s, Singapore has looked beyond Malaysia, receiving unskilled workers mostly from other Asian countries. In the late 1980s, the Singaporean State embarked on what has been termed 'an innovative immigration policy, using a combination of the price mechanism and employment quotas to regulate inflows of workers in line with domestic labour market conditions.' […] [In 2007,] an estimated 80% of all foreign workers f[e]ll into the unskilled category.[12]

2.7. Thus, "[t]he Singaporean government has carefully constructed a system under which different types of employment passes are issued to immigrant workers according to their qualifications and monthly salaries.… The government has also set different policies on recruiting foreign talent […] and foreign workers."[13] There are three types of work passes: the employment pass for those with professional qualifications who earn a fixed salary of at least $3,300; [14] the S-pass for mid-level skilled workers earning a fixed monthly salary of at least $2,200; and finally the work permit for low-skilled or semi-skilled workers.[15]

2.8. Singapore's work pass system relies on a sharp distinction between skilled "foreign talent" and less skilled or unskilled "foreign workers" or "transient" or "migrant workers" (hereinafter, "migrant workers").[16] "Foreign talent" refers to employment or S-pass holders who have professional qualifications or specialised degrees; they work at the higher end of Singapore's economy and are eligible to apply to become permanent residents. "Migrant workers" refers to semi-skilled or unskilled foreign workers admitted on short-term work permits to perform jobs—mainly in the manufacturing, construction, and domestic services

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[10] Theresa W. Devasahayam, "Placement and/or protection? Singapore's labour policies and practices for temporary women migrant workers," (2010) 15:1 J Asia Pac Economy 45, at 47.

[11] *Ibid*.

[12] *Ibid.*

[13] Ravi Chandran, "Management of Foreign Employees: A Singapore Perspective" (2008) 22 J Imm Asylum & Nat'lity L 350-357, 350.

[14] All dollar figures stated in this chapter are in Singapore dollars unless otherwise noted.

[15] See Ministry of Manpower, Foreign Manpower: Passes & Visas, online: Ministry of Manpower <http://www.mom.gov.sg>. [MOM, Passes & Visas].

[16] Cheah Wui Ling, "Migrant Workers as Citizens within the ASEAN Landscape: International Law and the Singapore Experiment," (2009) 1 Chinese J of Int'l L, 205–231.

sectors—that most Singaporeans shun as "dirty, dangerous, and demeaning." The majority of migrant workers come from the People's Republic of China, Indonesia, India, Bangladesh, Pakistan, Myanmar, Sri Lanka, the Philippines, and Thailand, as part of bilateral agreements between Singapore and these countries.[17]

2.9. Migrant workers' advocates have criticized the Singaporean work pass system as favouring economic growth over workplace protections: "Singapore is a deeply neo-liberal state, which has achieved its rapid development through the policies of a strong government that favours the interests of business and capital over labour, and especially foreign labour […]"[18] "Since the early 1980s, the rationale underlying Singapore's labour policies has been that of maximizing economic benefits while simultaneously minimizing social and economic costs, a logic which the State has long adopted towards foreign workers." [19] Nevertheless, despite a recent uptick in xenophobia among Singaporean voters in the 2011 elections, the government has "displayed greater seriousness in addressing migrant worker issues," especially with respect to safeguards for domestic workers.[20] For instance, as of January 2013, thanks to the Day Off Campaign orchestrated by various migrant workers and women's rights NGOs, all newly-contracted foreign domestic workers (FDWs) were finally given one mandatory rest day per week, although many still struggle to benefit from this right.[21] More recently, the government has proposed a specialised Small Claims Employment Tribunal to adjudicate claims of migrant workers.[22]

IV. Singaporean identity today

2.10. Despite being a nation of immigrants, Singaporeans generally do not strongly identify with the migrant labourers in their midst. "Singapore was and remains an immigrant society. Its immigrant policy is heavily affected by a pervasive

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[17] Brenda S. A. Yeoh, "Singapore: Hungry for Foreign Workers at All Skill Levels," Migration Policy Institute (Washington D.C.: Migration Immigration Source, 2007) at: <http://www.migrationpolicy.org/article/rapid-growth-singapores-immigrant-population-brings-policy-challenges/ >.

[18] Sallie Yea, AKM Moshin, & Debbie Fordyce, *A Thousand and One Days: Stories of Hardship from South Asian Migrant Workers in Singapore*, at 5 (Singapore: Banglar Kantha Publications 2014) (hereinafter "1001 Days").

[19] *See* Devasahayam, *supra* note 10 at 46.

[20] *Ibid*. Devasahayam cites various improvements in the laws aimed at protecting FDWs, including: encouraging but not mandating a standardized contract; allowing a day off; stricter penalties for abuse and ill treatment; raising the minimum age limit and formal educational level of applicants; checks on employers and mad agencies; altered repatriation and employment procedures; requiring employers to pay for full medical care and a safe environment; etc. *Ibid*. at 51-55.

[21] See Jolovan Wham, "Still Struggling for a Weekly Day Off," online: Workfair Singapore: <http://workfairsingapore.wordpress.com/2013/06/15/still-struggling-for-a-weekly-day-off/> (citing Amelia Tan, The Straits Times, published on Jan 24, 2013).

[22] See Tan Chuan-Jin, "A Great Workforce, a Great Workplace - Working as One for a Better Singapore," (keynote address by Acting Minister for Manpower delivered at the MOM Workplan Seminar 2014, 24 April 2014), at: http://www.mom.gov.sg/newsroom/Pages/SpeechesDetail.aspx?listid=474>.

sense of [in]security and economic vulnerability.[23] Surrounded by the Muslim-majority countries of Malaysia and Indonesia, Singapore is the only nation-state with an ethnic Chinese majority population in Southeast Asia. Paradoxically, its relative prosperity and decisive governance have […] exacerbated its innate sense of insecurity vis-a-via its neighbours."[24] Not surprisingly, the impressive changes that have occurred over the past decades have affected attitudes towards migrant workers.

2.11. Notwithstanding the country's colourful history as an island populated by migrant labourers and hardened seafarers,[25] most Singaporeans today do not identify as a country of immigrants, even though they celebrate their ethnic diversity every year at National Day celebrations. Although many Chinese and Indian Singaporeans have ancestors who came to the island as merchants, traders, money-lenders, and labourers, most do not relate—let alone interact—with the foreign labourers of today, even those who come from China, India, and Malaysia.

2.12. Of course, there are other more basic factors that influence Singaporeans' attitudes to foreigner workers:

> In hosting well over one million foreign workers into the country, the government has ensured that the ethnic balance is generally preserved by proportionately bringing in workers and migrants from China and India. Despite this, the differences in nationalities and cultures between the Singaporeans and foreigners have resulted in social tension. Sentiments over cultural difference have worked together with the sheer visibility of foreigners in an already dense Singapore to encourage the perception amongst the public that Singaporeans are being displaced from jobs, school, public transport[,] and other living spaces.[26]

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[23] Singapore has recently cracked down on illegal immigration. The country is connected to the Malaysian peninsula by a heavily-regulated causeway. Its lack of shared land-borders with its neighbours makes undetected illegal entry difficult, even by water. Due in part to tightening immigration controls at the border, nearly half of Singapore's illegal immigration now occurs when visitors have entered using a social visit pass overstay, or when foreign workers who have entered using a valid work pass remain in the country even after the work pass has expired or been cancelled. Illegal immigration into Singapore is severely punished, and illegal immigrants face both jail time and caning, while employers who hire illegal immigrants face jail time, fines, and possible caning.

[24] Eugene KB Tan, "Managing Female Foreign Domestic Workers in Singapore: Economic Pragmatism, Coercive Legal Regulation, or Human Rights?" (2010) 43 Israel Law Review 99 at 103.

[25] Kwa Chong Guan, Derek Heng, & Tan Tai Yong, Singapore: A 700-Year History: From Early Emporium to World City (Singapore: National Archives of Singapore, 2009), at 79-82.

[26] Bilver Singh, *Politics and Governance in Singapore: An Introduction*, 2d ed (Singapore: McGraw-Hill Education, 2012), at 115-16 (citations omitted). Critic Chris Lydgate describes Singapore's siege mentality:

"On 9 August 1965, Singapore proclaimed itself an independent republic. Through a quirk of history, the former British colony had become a … tiny overpopulated predominantly Chinese island, surrounded by hostile giants, an amputated capital dangling from the Malay peninsula… According to Minister for Information and the Arts George Yeo: 'Our success is the result of our anxiety, and the anxiety is never fully assuaged by success.'" See Lydgate, *supra* note 5 at

2.13. One key problem is how and where to house and "keep" the growing migrant worker population, as housing is already at a premium among the native population. This makes for contentious debate in Singapore, and efforts to keep the migrant worker population separate and invisible have not been wholly successful.[27]

3. WORKING WITH MIGRANT WORKERS: SOME BUILDING BLOCKS

3.1. Before discussing specific techniques of cross-cultural advocacy when working with migrant workers, this section introduces a few background concepts central to understanding the circumstances of migrant workers in Singapore. This includes the unique status of foreign domestic workers, the government bond as contrasted with the levy system, and the non-portability of the work permit.

I. A note on foreign domestic workers

3.2. Most Singaporeans refer to foreign domestic workers as "helpers," "maids," and "aunties." In contrast to the esteemed "black and white amahs" of decades past who came from Southern China,[28] most foreign domestic workers in Singapore now come from the Philippines and Indonesia, "with smaller numbers from Sri Lanka, Myanmar, and India[,]" and, more recently, Cambodia. Thanks in large part to FDWs, who care for Singapore's young and elderly, a remarkable 72% of Singaporean women today work outside the home.[29]

3.3. This Manual will use the more formal term "foreign domestic workers" (hereinafter "FDWs") in recognition of the fact that these women are workers and therefore arguably deserve the rights and protections afforded other workers under the law, despite the fact that they work in the domestic sphere, in the home, and perform only "housework," which has traditionally not been

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11. It may have been this anxiety led that led voters in the 2011 elections to put pressure on the government to restrict access to permanent residence and citizenship.

[27] Notably, in 2012, the government instituted a graduation requirement for all law students mandating that they perform at least twenty hours of pro bono work during law school. See <http://www.sile.edu.sg/pro-bono-programme>. A good number of the law students—ones who have prospered because of Singapore's transformation and the financial security it has brought them and their families—are now looking to do more, to give back to the community and, in particular, to groups which have not benefitted equally from Singapore's economic miracle. Low-income migrant workers have benefited from this trend.

The push to do more pro bono work has allowed law students to experience first-hand the problems of migrant workers—problems that are otherwise mostly hidden as a result of the physical and social segregation of these workers in the city-state. Most students are shocked and dismayed when they learn about some of the difficulties faced by these workers—such as unpaid wages, dangerous work conditions, forced repatriation, etc.—and increasing numbers of students have chosen to get involved in effort to improve the plight of Singapore's migrant workers.

[28] Ooi Keat Gin, "Domestic Servants Par Excellence: The Black and White Amahs of Malaysia and Singapore with Special Reference to Penang" (1992), 65:2 *Journal of the Malaysian Branch of the Royal Asiatic Society* 69.

[29] See e.g. Tan, *supra* note 24.

viewed as real work.[30] FDWs in fact are required to "live in" at home with their employers.[31]

3.4. Few of Singapore's labour laws apply to FDWs. The Employment Act expressly excludes domestic workers, along with certain other categories of workers, exempting them from laws concerning wages, contract requirements, work conditions, sick and holiday leave, workmen's compensation, etc.[32] As Eugene Tan explains: "The abiding association of FDWs with the domestic sphere—buttressing the notion of privacy, harmony, familial obligations and responsibilities—denies such workers full access to a range of rights, since the home is not perceived as an appropriate setting for the structuring of an employer-employee relationship that is heavily rights-based."[33]

3.5. Overwhelmingly female, FDWs face special legal restrictions that other foreign workers do not. First, every six months, they are required to undergo a medical examination to screen for infectious diseases and pregnancy; an FDW who fails this examination faces immediate repatriation.[34] (Giving birth in Singapore is a violation of the work permit rules). Additionally, all low-skilled foreign workers who hold a work permit—including but not limited to FDWs—must comply with Singapore's "marriage restriction policy," which prohibits marriage to a Singaporean citizen or Permanent Resident in or outside Singapore, both while holding a Work Permit or after the Work Permit has expired or been terminated.[35] This marriage restriction does not apply to employment or S-pass holders, who have professional qualifications or specialised degrees and who, as noted above, are also allowed to apply to become permanent residents.[36]

3.6. There are no minimum wage laws in Singapore. Generally, the salaries of FDWs range from $400 to $700 per month. However, salaries remain unregulated and can actually be less than $400 per month, especially for those FDWs who are less fluent in English, who are less knowledgeable, and who are thus less assertive vis-à-vis their employers.

II. Monthly levy versus one-time security bond

3.7. With all foreign workers, it is important to distinguish between the monthly levy and the one-time security bond. In short, the levy is a monthly tax imposed by the Singaporean government on foreign labour, whereas the government security bond is like a security deposit, which is forfeited by employers if they, or their worker, fail to comply with certain conditions.

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[30] See Tan, *supra* note 24 at 108.

[31] *Ibid*.

[32] *Employment Act*, Ch.91, Statutes of the Republic of Singapore (revised ed. 2009).

[33] Tan, *supra* note 24 at 108.

[34] *Ibid* at 112.

[35] *Ibid* at 112.

[36] See <http://www.mom.gov.sg/foreign-manpower/passes-visas/work-permit-fw/other-information/Pages/marriage-application-process.aspx>.

A. The levy

3.8. Every employer must pay a monthly levy for each of the foreign workers she employs. The levy is essentially a government tax aimed at discouraging employers from hiring foreign employees over local ones. Notably, the levy amount is substantially higher for hiring an unskilled worker than for a professional foreign worker (upwards of $400 versus only $80 per month).[37] In the case of FDWs, for example, an employer generally must pay a levy of $265 per month to the government;[38] notably, some of these employers pay the workers themselves only $300 or $400 per month. Migrant worker NGOs have argued that the high levy amount—all of which goes directly to state coffers—substantially increases the cost of hiring foreign employees in sectors where locals are unwilling to work anyway. This creates incentives for employers to pass the additional cost onto the workers in the form of exploitative cost-cutting practices.[39]

B. The bond

3.9. Since 1986, all employers of non-Malaysian work permit holders must post a one-time security bond, currently a flat S$5,000.00 per worker.[40] The bond is forfeited if the employer is deemed to have failed to ensure that her worker complies with the terms of employment. For example, the bond can be forfeited if the employer does not pay for the worker's repatriation or other necessaries or, in theory, if the employer fails to pay the worker's salary and medical expenses or to provide "acceptable" accommodation. NGO advocates like Alex Au of TWC2 ("Transient Workers Count Too") have argued that the security bond has created a system of private policing in which employers, not wanting to forfeit their bond, feel compelled to monitor their employees' whereabouts, to "safeguard" their employees' passports and identification documents, and even resort to using repatriation companies to locate and forcibly remove employees if they go missing. This policing can be especially egregious in the case of FDWs, whose employers may prevent them from having rest days or from leaving the home unaccompanied out of fear that she "may be in bad company or engage in activities that would breach the conditions attached to the work-permits," such as by becoming pregnant.[41] According to critics, the bond increases the likelihood that employers will "exercise[e] their power to the point of being abusive."[42]

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[37] Advocates from migrant worker NGOs have more generally argued that imposing higher levies on lower paid workers seems counterintuitive given that most Singaporean adults want professional jobs requiring skills and generally refuse unskilled jobs, regardless of the pay. See generally Devasahayam, *supra* note 10 at 49.

[38] See <http://www.mom.gov.sg/foreign-manpower/passes-visas/work-permit-fdw/before-you-apply/Pages/default.aspx#levy>.

[39] In addition to levies, the Singaporean government imposes outright quotas on certain sectors that employ foreign workers. See <http://www.mom.gov.sg/foreign-manpower/foreign-worker-levies/Pages/calculation-of-foreign-worker-quotas.aspx>.

[40] See Devasahayam, *supra* note 10 at 49.

[41] *Ibid*.

[42] *Ibid*.

3.10. Unfortunately for migrant workers, notwithstanding the bond conditions imposed on employers (e.g. to pay the worker), the Ministry of Manpower does not use the forfeited bond amounts to reimburse workers for legitimate employment claims they have against their employers, such as unpaid wages, despite NGO requests to do so.

III. Law in theory versus law in practice: the harsh realities of migrant work in Singapore

"Fear of losing one's job is a dilemma faced by every worker who wishes to file a complaint against an employer."[43]

3.11. For those work-permit holders who face financial exploitation and even physical abuse, speaking out comes with huge risks, and most choose to remain silent.[44] The biggest barrier to speaking out is the near impossibility of transferring employers while retaining one's work permit. "An inflexible work pass system that restricts job mobility and allows employers to terminate workers swiftly leaves workers at a disadvantage and unable to bargain for better working conditions."[45] If the employer decides to terminate a worker for any reason, he can unilaterally cancel the worker's work permit, sometimes as quickly as within one day,[46] and the worker will be forced to return home. Only in certain special cases does Singapore's Ministry of Manpower ("MOM") allow workers with valid claims to seek a change in employer.[47] (For more, see MOM subsection on "Temporary Job Scheme" below at 3.18).

3.12. In general, then, "[w]orkers who wish to switch employers need to return to their countries of origin before making a fresh application for a job in Singapore. However, this is a costly option for many workers, as it would mean they would have to pay hefty recruitment fees or "agent fees" again."[48] In order to reach Singapore, many workers must pay exorbitant fees charged by the agent and

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[43] H.O.M.E. & TWC2, "Justice Delayed, Justice Denied: The Experiences of Migrant Workers in Singapore: 2010 Report," at 9 online: < http://twc2.org.sg/2010/12/15/justice-delayed-justice-denied/> (hereinafter, "Justice Delayed").

[44] When they first hear stories of migrant workers tolerating repeated and systematic wage theft—and, especially in the case of FDWs, sometimes even physical and emotional abuse—law students inevitably ask why any rational person would tolerate such behaviour. In fact, a better question would be why any rational person in the difficult circumstances many migrant workers face ever speaks out, given the enormous stakes.

[45] See Justice Delayed, *supra* note 43 at 1.

[46] *Ibid*.

[47] Except in very limited cases, the migrant worker cannot transfer his work permit to another employer. Only in certain special cases does MOM allow workers with valid claims to seek a change in employer (for more, see subsection on "Temporary Job Scheme" below). If their employment relationship is terminated, FDWs are given only one week to find another employer or face repatriation, and, even then, transfer requires approval from their previous employer. *Ibid*.

[48] *Ibid*. at 9. The premature termination of a contract is a great loss for a migrant worker. The current system of international migration for low-wage workers is largely controlled by private companies and individuals spanning international borders. The transnational nature of the industry poses a major challenge for governance. Businesses involved in labour migration generate profit by charging fees for services rendered such as job training and job placements. These fees are largely extracted from migrant workers. *Ibid*.

other middle men. Many must sell their only assets or valuables—including land, homes, or family jewellery—or take on enormous debt, from relatives, banks and money lenders to pay these fees.[49] For example, many Bangladeshis pay $8,000 or more, to come to Singapore. It would take more than 95 months (nearly 8 years) for a Bangladeshi worker earning the garment worker minimum wage of $85 per month to pay off this debt. Even making Singaporean migrant worker wages, it would take almost one full year to pay off this debt.[50]

3.13. Moreover, many migrant workers do not choose to "exercise their entitlements under the contract for fear of getting themselves in trouble and creating a 'black mark' in their 'work card report' in Singapore,"[51] making it difficult to return to work in Singapore in the future. "The ease with which an employer can terminate a worker's employment and cancel his or her work permit makes the worker vulnerable to unjust dismissals. Knowing that migrant workers are dependent on them for their livelihood, some employers abuse this power for the purpose of keeping migrant workers compliant."[52] For this reason, many savvy workers will wait until their work permit is about to expire before bringing claims against their employers, even if they know that failure to do so immediately will be viewed with suspicion and that their total recovery may be limited by their failure to bring their claims in a timely manner.

3.14. It is therefore no wonder that workers in these situations feel they cannot complain when they arrive in Singapore and discover that reality may be different from what they were promised: some do not get the wages they were promised; others must pay their employer a kickback; and still others face large salary deductions for substandard housing that was promised as free. It therefore not surprising that many workers seeking help for one issue end up disclosing after an extended interview the existence of a myriad other employment law violations they have suffered. For example, countless workers seek assistance from local Singaporean NGOs after suffering debilitating work-related injuries, only to reveal that they have not been paid their full salary for many months, or that their employer has been regularly making unlawful deductions from their salary.

3.15. The Singapore experience for workers who are forced to return home early because of injury or unjust termination (simply because they complained) is often tragic. After working for only a few months, some are repatriated while still

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[49] See Justice Delayed, *supra* note 43 at 9-10.

[50] *Ibid*. "On average, the fee paid to agents constitute at least ten months of a migrant worker's potential earnings in Singapore." *Ibid*. "The industry is notorious for unethical practices and human rights abuses, with the harshest critics likening it to slavery. The current system takes advantage of migrants from less economically developed countries where migration is necessary for many in order to improve their livelihood. Like in many other destination countries, the recruitment of migrant workers in Singapore is dominated by private companies. A migrant worker bound for Singapore parts with thousands of dollars in fees that are usually paid to labour agents. … This fee differs for different nationalities and occupations and has changed over time." *Ibid* at 9.

[51] See Devasahayam, *supra* note 10 at 52.

[52] See Justice Delayed, *supra* note 43 at 9.

in debt and worse off financially than they were before they migrated to Singapore.[53]

3.16. Limitations of the special pass.[54] When workers decide to bring claims against their employers pursuant to MOM's labour court process, their work permits are cancelled, and the Ministry issues a Special Pass, enabling them to remain in Singapore—but not to work—until their case is resolved. Advocates have argued that the Special Pass system punishes workers, making them choose between pursuing their livelihood and pursuing their legal claims:

> Ensuring workers receive justice and compensation is a difficult and protracted process… The long and uncertain wait … has a damaging impact on the [worker's] economic, emotional and physical health due to the restriction against working. … Migrant workers can languish in Singapore on this visa for months that can stretch into years, making them an exemplary case of 'permanently temporary' migrants. As one migrant worker in this situation reflected, "Singapore is like a prison to us[.]" … It seems that not only do employers punish workers who stand up for their rights, but that the visa regime of the Special Pass further penalizes them. [M]any men on Special Passes… suffer social and emotional damage during their long and uncertain existence on a Special Pass.[55]

3.17. Of course, many of these workers—without food, housing, and a job—eventually start working illegally. Without the job and salary restrictions imposed by their work permits, these workers can get a variety of jobs and often end up earning upwards of $80 per day, in contrast to the $30 per day or less they earned working legally. However, they risk criminal prosecution and having their employment claims thrown out. Many live in fear of being caught, but feel that they have no choice, having been left with no means to support themselves and their families. [56] Complicating matters, those who choose to pursue administrative hearings at MOM often face contrary testimony not only from the employers who wronged them, but also from their fellow employees, many of

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[53] Undoubtedly, the remittances sent home as a result of the Singaporean migrant economy benefit various countries across the region: the Philippines alone received about S$300 million for the first quarter of 2013 alone. See e.g. <http://www.philstar.com/business/2013/02/15/909187/2012-remittances-hit-record-high>; <http://therealsingapore.com/content/filipinos%E2%80%99-remittance-reaches-56b-philippines>. Most poignant was the story of the Bangladeshi construction worker who returned home permanently injured and still owing thousands of dollars to a local money-lender. He admitted that before coming, he had heard stories of injury and crippling debt from his compatriots who had returned home from Singapore, but he refused to listen. Even worse, he was certain that when he told his story to his fellow countrymen, they too would refuse to listen—the promise of success in Singapore was simply too tempting to pass up.

[54] See 1001 Days, *supra* note 18 at 5.

[55] *Ibid.*

[56] Amelia Tan, "Workers find illegal jobs though informal network," The Straits Times (25 November 2013) at: <http://www.straitstimes.com/breaking-news/singapore/story/foreign-workers-find-illegal-jobs-through-informal-network-20131125>.

whom offer false testimony on behalf of the employer out of a legitimate fear of losing their own jobs.

3.18. Temporary job scheme. The one bright spot in the landscape is the relatively recent Temporary Job Scheme (TJS). MOM issues these renewable six-month work permits to workers who are assisting authorities with investigations as prosecution witnesses.[57] Unfortunately, the TJS excludes certain workers: "workers pursuing salary arrears claims and work injury compensation claims are not eligible to see work through the TJS."[58] Furthermore, many workers have difficulty finding jobs that qualify under myriad rules and regulations imposed by the TJS regime.[59]

4. WORKING WITH MIGRANT WORKERS: CROSS-CULTURAL ADVOCACY

4.1. It would be a weighty task to try to familiarize oneself with every migrant group in Singapore, as well as their specific subgroups that vary based on gender, socio-economic status, educational level, religion, etc. Only by actually working over a sustained period of time with migrant workers themselves can an advocate begin to gain some of this knowledge. Rather than trying to cover the whole field, this section seeks to sensitize readers to just a few of the cross-cultural issues that may arise when interacting with Singapore's migrant workers.

4.2. First, it is important to recognize that there can be enormous diversity within a single country or region, and although a worker may come from a particular country or region, he may differ significantly from his compatriots as a result of various cultural factors. For example, one long-time TWC2 volunteer explained that her NGO had to partner with two different restaurants for its Cuff Road Project, a free meal programme for injured workers from South Asia. TWC2 realized that Bangladeshi and Tamil cuisines differ in important respects, despite their basic similarities. Most Tamils maintain a vegetarian diet, while Bangladeshis tend to prefer dishes made from fish and lamb.

4.3. Because of historic tensions based on religion, language, tribe, ethnicity, etc., migrant groups whose home countries or regions are close geographically may actually find this very closeness to be a barrier to forming ties. For example—in spite of, or perhaps as a result of, having lived in close proximity for centuries in what was once the British colony of India—Bangladeshis and Pakistanis may feel antagonism toward Indian Punjabis, and vice versa. It is no surprise that local Singaporean charities that receive and give food donations are careful to distinguish items donated after being used as altar offerings and foods designated as halal. Some Muslims might take offense at being offered these "left-over" offerings from a Buddhist or Hindu shrine.

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[57] See Justice Delayed, *supra* note 43 at 29.

[58] *Ibid.*

[59] *Ibid.*

4.4. Different motivations for different workers: an example. No matter how well practitioners think they understand a worker and his cultural background, they should refrain from making assumptions and, when they must make assumptions, they should be sure to test them regularly. HealthServe, a local migrant worker NGO, was assisting a Chinese construction worker from Guangdong Province who insisted on remaining in Singapore for months after his work permit had been cancelled in order to litigate his salary claims. An untrained advocate might have assumed that she understood his motivations in remaining in Singapore: i.e. he was staying because he needed the money to support his wife and child back home.

4.5. Based on this assumption, an untrained advocate might also have recommended that the worker would do better by returning home and finding a job there. She might even have "done the math" for the worker in an effort to show him that he had already spent more in living expenses while in Singapore than he would recover from his salary claim, even assuming he was awarded the full amount he had requested. However, the seasoned advocates at HealthServe understood that the worker was determined to stay and fight his case as a matter of principle, both for himself and his fellow workers. Only by understanding the worker's underlying motivations were the HealthServe advocates able to fully appreciate the worker's concerns and properly advise him.

I. Migrant workers' perceptions of the law and the criminal justice system

4.6. Most migrant workers come from countries where, in stark contrast to Singapore, the legal system and the criminal justice system in particular—including the police, prosecutors, and judges—are inefficient, unreliable, and often corrupt. Members of the general public in workers' home countries may fear contact with the criminal justice system, especially the police, as these institutions are seen as using violence and other unlawful techniques in carrying out their duties. Because of rampant corruption at home, those accused of crimes can often avoid prosecution by bribing officials at various levels, including the police and even judges.

4.7. Not surprisingly, many FDWs accused of stealing small items from their employer's homes are surprised at the speed with which their Singaporean employers call the police and with which charges are brought against them. Similarly, the South Asian migrant workers allegedly involved in the Little India Riot of December of 2013 may have been unprepared for the swiftness of the response of the Singaporean criminal justice system. Some commentators have argued that the events leading up to the rioting were shrouded in cultural misunderstanding, and that the crowd may have misinterpreted the behaviour of the Singaporean police towards the guilty party (the lorry driver) as being ill-

intentioned, based on their assumption that police officers normally behave in a manner that is corrupt.[60]

4.8. Comparing Chinese and Indian attitudes towards lawyers can also be instructive. In general, migrant workers from mainland China tend to be distrustful of lawyers and the law, seeing the law as "purely instrumental and applied arbitrarily, providing little protection for rights or expectations."[61] In general, because the role of advocate often conflicts with the culture's preference for mediation and conciliation, the Chinese have never fully supported the role of lawyers in society, although attitudes are now changing. However, even today, lawyers in China are not seen as wholly independent of the government, and are perceived as not acting as zealously as they might in order to avoid jeopardizing their own careers.[62]

4.9. By contrast, Indians may have greater faith in the legal system as a means of correcting injustice, notwithstanding the Indian criminal justice system's susceptibility to graft. Because of the possibility of corruption in the legal system, however, Indian litigants may insist on remaining in the jurisdiction until their claim has been adjudicated, feeling that their absence from court might prejudice the process. Of course, notwithstanding these generalizations, practitioners should be aware that perceptions of lawyers, the criminal justice system, and the legal system in general will vary greatly depending on the experiences of each individual migrant worker, including his education level, his past experiences with the legal system, and other factors.

4.10. Another source of cross-cultural disconnect can be the timing and length of the legal process. The Singaporean legal system is remarkably efficient in comparison with those of other countries. In India, for example, a case can take

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[60] The crowd of workers apparently became increasingly agitated when the police removed from the scene the driver of the bus that killed the worker without placing him in handcuffs. Based on South Asian perceptions of police misconduct, the crowd may have misinterpreted the police as removing the guilty driver from the scene in order to protect him from being properly punished. Supporting this interpretation, "Tamil-speaking officers [on the scene] quoted some of the rioters shouting 'Are our lives worthless?' and 'You all only look after the local people!'" See Channel News Asia, "Committee of Inquiry: What Cause the Little India riot?" (30 June 2014), at: http://www.channelnewsasia.com/news/singapore/committee-of-inquiry-what/1222586.html. After traffic accidents in South Asia, observers often engage in "retributive justice," taking matters into their hands and sometimes even assaulting the guilty party, in part because the police either cannot or will not (because of corruption) mete out justice themselves. In fact, the Singaporean police were simply doing their jobs—removing from the scene the driver as the possible source of a likely riot and pulling him aside for questioning. The police undeniably made mistakes that night, but their behavior merits commendation in that nearly all the injuries that night were suffered by Singaporean law enforcement and not members of the crowd.

[61] Rob McQueen & Wesley W. Pue, "Misplaced Traditions: British Lawyers, Colonial Peoples" (1999) 16 Law in Context 1.

[62] James M. Zimmerman, *China Law Deskbook: A Legal Guide for Foreign-invested Enterprises*, Vol. 1 (Chicago: American Bar Association, 2010), also online: <http://books.google.com.sg/books?id=oDpWHVz2tO0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>.

years to resolve, and a number of cases have been pending for more than twenty years.[63] Many workers simply have no idea how long their Singaporean cases will take. Others, thinking that their MOM case will take approximately 3-6 months, become disillusioned when they learn that enforcing their MOM judgment in civil court may take a few more months at the very least. Advocates should set aside extra time to explain to workers how long the legal process—with all its various permutations—may take, while making sure not to give workers unrealistic hopes about timing and outcome. Advocates should always remember that assessments of a case's length and timing will affect a worker's decision whether to remain in Singapore to pursue the case in hopes of settlement or judgment, to return home and fight the case from abroad, or to not pursue the case at all.

II. Challenges with language and interpreting/translation

4.11. First and most important, advocates should never "talk down" to their clients. Even when using simple language, the advocate should speak to the client as the advocate would like to be spoken to. In terms of language, when working with migrant workers in Singapore, being able to speak a second or third language is a tremendous asset. Undeniably, workers—like all clients—tend to develop rapport and trust more quickly when they are working with someone who can speak their own language. That said, numerous challenges come with being able to speak to the workers in their native tongue. Singaporean advocates and their clients may become frustrated when the Mandarin or Tamil that advocates learned in school or at home is quite different than what the client speaks. Variations arising from the speaker's background—such as geography (including regional variations in accent or dialect), educational background, socio-economic status, and even gender—can all affect communication.

4.12. For those times when advocates are unable to speak the client's mother tongue(s), if the worker clearly feels comfortable speaking in English, using Singlish can be indispensable. Singlish represents the lingua franca used by migrant workers to speak amongst themselves in the face of language barriers on the job and can greatly aid communication.

4.13. Explaining legal terms. Even if the advocate speaks the client's native language fluently, legal terms will always present a challenge when translating or interpreting. One suggestion is to consider in advance which legal or non-legal terms needed in an interview with a migrant worker ("housing," "wages" or "pay", "deduction," "sex worker," etc.) and familiarize oneself with them beforehand. That said, some legal terms of art will be difficult—if not impossible—to translate or interpret word for word. Take, for example, the legal terms like "mediation," "medical leave," "consent," and "defence." Such legal terms of art cannot and probably should not be translated word-for-word. Even native English-speakers

[63] Associated Press, "Report: India Court 466 years behind schedule" (12 February 2009) online: <http://www.nbcnews.com/id/29164027/ns/world_news-south_and_central_asia/t/report-india-court-years-behind-schedule/>.

untrained in the law will not fully grasp the meaning of such terms.[64] Thus, when faced with difficult terms to translate, advocates should see this as an opportunity to use simple words the client will understand, and then confirm and perhaps even test that she has properly understood by asking her to repeat back what has been said. Depending on the circumstances, an approximation of the term's meaning may suffice.

4.14. Advocates should therefore never hesitate to ask when they are unsure about the meaning of a particular term. Advocates should be mindful of their limitations, but not stymied by the need for the "perfect translation." When unsure about a particular vocabulary word, ask the client for help; in most cases, clients will feel empowered that they are in a position to assist, and the exchange will help to break down barriers. For many advocates, it is thanks to their clients that they have achieved fluency in a second or third language. One first-year law student reported that after working with one of HOME's Chinese-speaking case workers, his Chinese improved exponentially, in ways he would never have anticipated, and learned many things he could never have in a classroom setting.

III. Workers' educational levels and socio-economic background

4.15. Advocates may be surprised to learn that not all low-skilled or semi-skilled migrant workers in Singapore come from low-income families. In fact, they may be quite educated and well off compared to their peers back home. Knowing that they will have to invest thousands of dollars in recruitment fees simply to get their loved ones to Singapore, many families send their smartest, most promising members to work abroad, whether children, siblings, spouses, or parents. FDWs, in particular, are required to have a minimum of eight years of formal education, and many, especially those from the Philippines, have technical diplomas and/or university degrees. They simply cannot find jobs back home or cannot earn as much as they can in Singapore. Some workers are promised decent jobs and are brought in on skilled or semi-skilled work permits, only to find themselves doing manual labour when they arrive in Singapore—the result of unscrupulous employers' attempts to avoid paying the higher levy for unskilled workers. Advocates should not assume that a worker is uneducated and does not possess at least some technical training simply because he performs unskilled construction work while in Singapore.

[64] As a lawyer in court, I remember being hesitant when asked by judges to translate for an unrepresented party who did not speak any English. One of my fears was that I would come across a word like "perjury" or "unreimbursed medical expenses" and would be unable to find an English equivalent. Eventually, I realized that the parties for whom I was translating these terms actually understood these terms better than those who spoke English because I was not translating word-for-word. This experience led me to think more about how to best to explain what "unreimbursed medical expenses" are to my own clients, English and non-English-speaking alike, and I am a better lawyer because of it.

IV. A healthy dose of realism

4.16. The biggest challenge in working with migrant workers is how to advise them, given the disconnect between the law and reality. When working in this area, one quickly realizes how knowledgeable and experienced the NGO case workers and volunteers are, and one comes to appreciate their ability to give the workers hopeful substantive advice without creating unrealistic expectations.

4.17. The greatest disservice advocates can do for migrant workers is to give them an unrealistic assessment of their case based on laws in books that do not reflect the reality on the ground. It can be disheartening to see a pro bono lawyer from a prestigious law firm advising a worker that in order to substantiate his forgery allegation to bolster his unpaid wages case pending before MOM, all he has to do is make a report of the forgery at a police station and ask that an expert handwriting analysis be done to compare the signatures. Unfortunately, the reality in most cases is that after taking a report from the worker and interviewing the employer, the police are forced to tell the worker that they cannot do much more unless he can pay for the handwriting expert, which can cost upwards of S$5,000.

4.18. Even worse, advocates can give advice that endangers the very workers they are trying to assist. Workers who stand up to exploitative employers may face forced repatriation and even violence at the hands of thugs hired by the employers, their mangers, and employment agents.[65] Remaining in Singapore to fight one's employment claim may not make sense either, especially considering the financial drain of remaining in Singapore without a job, and the emotional stress of spending months apart from one's family. Advocates must also consider the possibility that the judgement ordered by the MOM Labour Tribunal or the civil court will represent only a portion of the amount actually owed, as well as the reality that it will be costly, if not impossible, to enforce the judgement against a transient employer. These concerns—combined with the Singaporean rule that losing parties are responsible for paying court expenses and costs—may make it imprudent for a worker to pursue even the strongest employment claims.

4.19. The greatest service advocates can perform is to listen and empathize; if they are lucky, in a few cases, they may also be able to make a difference. The Malaysian father of three, who had been waiting in limbo for over a year in Singapore while MOM investigated his employment case and withheld his passport, was grateful simply because the clinic student who interviewed him listened and empathized, offering him a tissue when he broke down remembering the last time he had held his infant daughter. Fortunately, thanks to an email to MOM drafted by the student and sent by the caseworker, followed up with a phone call, MOM returned the worker's passport three days later and, overjoyed, he returned home to his wife and young children. Unfortunately, as any migrant workers advocate will confirm, successes like this can sometimes be rare. Even where cases bring defeat, disappointment, and even disillusionment for both the workers and the advocates advising them, the

[65] See Justice Delayed, *supra* note 43 at 13-14.

gratitude of the workers and the occasional victories make advocacy in this area worthwhile. And with each victory—however small—the state of legal justice in Singapore advances.

4.20. The next chapter explores some of the most common legal issues that migrant workers face, and the potential legal remedies available to those who will be bringing or continuing their claims from abroad.

Chapter 2:
Common Legal Problems and Available Remedies

CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

1. INTRODUCTION

I. An outline of the chapter

1.1 This chapter highlights common problems faced by migrant workers and lays out the available substantive civil causes of action. The aim is to aid practitioners in evaluating the client's case to identify viable claims, keeping in mind the legal elements, evidentiary requirements, burden of proof, and remedy sought.

1.2 Section 2 explores the various options available to migrant workers facing issues of non-payment of salary. In three parts, it lays out recruitment and employment matters, including relevant statutes relating to employment law—primarily the Employment Act (EA) and Employment of Foreign Manpower Act (EFMA); common salary disputes, which can be divided into underpayment of an agreed salary and dispute over the sum to be paid; and finally the legal remedies available.

1.3 Another common problem that migrant workers face is illegal payments and deductions that are made from their salary by employers or employment agents. Section 3 highlights the various forms of illegal payments and deductions that practitioners should look out for, and the causes of action that may be available against employers or employment agents to recover these sums of monies.

1.4 Section 4 addresses two other common non-salary employment agreement problems: breach of non-salary employment conditions and promises of non-existent jobs. The former focuses on the statutory obligation of employers to bear the costs of upkeep and maintenance of workers, and to ensure minimum standards of food and accommodation.

1.5 Apart from salary and contractual problems, some workers face difficulty in claiming compensation for injuries sustained on the job. Section 5 lays out and compares the two main routes by which an injured worker can pursue a claim for workplace injury—by statute (WICA) or through the tort of negligence in common law.

1.6 Workers may also sustain injuries outside of work. Section 6 highlights the civil claims available to a victim of physical abuse by their employer.

1.7 The final section will consist of the relevant statutes and cases that were mentioned in this chapter.

2. NON-PAYMENT OF SALARY

2.1. This section addresses basic employment matters, common salary disputes migrant workers encounter, and the legal remedies that are available.

2.2. As a preliminary note, Singapore does not have a minimum wage (but a tripartite body formulates wage guidelines).[1] This means that an employee's salary is, in principle, subject to negotiation between employees and employers. In practice, however, power imbalances between employers and employees mean that employees rarely have much involvement in the setting of salary.

2.3. Non-payment of salary may involve the underpayment or complete non-payment of the agreed salary. Simple claims of contractual debt may involve factual disputes, such as when an employer contests the number of overtime hours worked by the client and refuses the pay the full outstanding amount.

2.4. More complex situations arise where the enforceable contract term is in dispute. The organisation of labour in the low-wage, low-skilled worker sector is often haphazard and informal. During the process of recruitment, migration, and employment, labour agents and employers may make representations and promises that are inconsistent or even contradictory.

I. Basic employment matters

2.5. This subsection addresses A) the process of recruitment during which salary issues may arise, B) the main pieces of legislation relating to employment law-EA and EFMA, and C) the formulas for calculating salary payable to a client.

A. Process of recruitment

2.6. The recruitment of migrant workers in Singapore is dominated by private companies.[2] To secure a job in Singapore, a prospective worker will typically contact a labour agent while still in their home country. This agent will often make representations or promises about the potential offer or terms and conditions of employment in the receiving country. Where a prospective worker agrees to accept a job organised by the home country labour agent, not all agreements between the agent and prospective worker are recorded in writing and many remain entirely oral.

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[1] As of September 2014, employers must comply with licensing conditions under the government's new licensing regime, which mandates an entry-level wage of S$1000 for cleaners. However, this legislation only applies to the "resident workforce. Ministry of Finance, Speech, "Speech By Mr Tharman Shanmugaratnam, Deputy Prime Minister & Minister for Finance, At The e2i Best Sourcing Symposium" (8 January) online: MOF Newsroom <http://app.mof.gov.sg/>.

[2] Humanitarian Organisation for Migration Economics (H.O.M.E.) & Transient Workers Count Too (TWC2), *Justice Delayed, Justice Denied: The Experiences of Migrant Workers in Singapore*, (Singapore: H.O.M.E. & TWC2, 2010), online: Transient Workers Count Too <http://twc2.org.sg/wp-content/uploads/2013/09/Justice-Delayed-Justice-Denied-ver2.pdf> at 10 [HOME & TWC2, *Justice Delayed, Justice Denied*].

2.7. A migrant worker bound for Singapore often pays thousands of dollars in placement fees. Three common types of placement fees are:

1) Home country agent fees;
2) Home country training centre fees; and
3) Host country agent fees.

2.8. Interviews conducted by Transient Workers Count Too (TWC2) reveal that this sum of money is regularly raised by selling real property assets, and borrowing from relatives, banks, and/or money lenders.[3] Further, TWC2's interviews indicate that on average, the fees paid to agents constitute at least ten months of a migrant worker's potential earnings. This fee differs by nationality and occupation, and changes over time.

B. Employment legislation

2.9. Apart from common law contractual principles, employment contracts are subject to the Employment Act[4] (EA) and Employment of Foreign Manpower Act[5] (EFMA).

i. Employment Act (EA)

2.10. EA is Singapore's main labour legislation, and it specifies the minimum terms and conditions of employment. For clients who fall within the scope of EA, the law provides two avenues for redress:

1) Lodging a claim with the Labour Commissioner (i.e. "The Ministry of Manpower route"); or
2) Bringing a civil claim via the courts.[6] (i.e. "The civil route").

2.11. Where the employer breaches a right conferred by the Act, but not a right specifically conferred by the contract of service, the employee has a civil right of action for breach of statutory duty.[7] The civil route is open to a client as long as proceedings with the Labour Commissioner are either not instituted, or, if instituted, have not proceeded to judgment under the Act.[8] Refer to Chapter 3, Section 3, for the processes of the two routes.

2.12. In terms of employment conditions, Part III of the EA governs the conditions for payment of salary, and Part IV specifies the payment of overtime and work on rest days.

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[3] *Ibid*.

[4] *Employment Act* (Cap 91, 2009 Rev Ed Sing) [*EA*]. See Chapter 2, Section 8.IV. for the text of the law.

[5] *Employment of Foreign Manpower Act* (Cap 91A, 2009 Rev Ed Sing) [*EFMA*]. See Chapter 2, Section 8. VI. for the text of the law.

[6] Ravi Chandran, *LexisNexis Annotated Statutes of Singapore Employment Act* (Singapore: LexisNexis 2009) at 183 [Chandran, *Annotated EA*].

[7] *Ibid* at 188.

[8] *EA*, *supra* note 4 at s 132.

Who is considered an employee under the Employment Act (EA)

2.13. Under the EA, an 'employee' means any person who has entered into or works under a contract of service with an employer, excluding: [9]

1) Seafarers;
2) Domestic workers; and
3) Professionals, managers and executives (PMEs) earning above $4,500 a month.[10]

2.14. The EA creates a subcategory of "employees" for the purposes of Part IV of the Act, which provides for certain minimum entitlements. Part IV of the Act applies only to the following categories of the EA employees:

1) All employees who fall within the scope of the Act (other than workmen and PMEs) who are earning not more than $2,500 per month (excluding overtime payments, bonuses, annual wage supplements and productivity incentive payments); and
2) All "workmen" who earn not more than $4,500 (excluding overtime payments, bonuses, annual wage supplements and productivity incentive payments).[11]

2.15. A "workman" is defined by the EA as: [12]

1) Any person, skilled or unskilled, doing manual work;
2) Any person, other than clerical staff, employed in the operation or maintenance of mechanically propelled vehicles that transport passengers, for hire or for commercial purposes;
3) Any person employed to supervise any workman and perform manual labour, provided that the time spent on manual work is more than half of the total working time in a salary period; or
4) Any person specified in the First Schedule of the EA, namely cleaners; construction workers; labourers; machine operators and assemblers; metal and machinery workers; train, bus, lorry, and van drivers; train and bus inspectors; and all workmen employed on piece rates at the employer's premises.[13]

[9] *Ibid*, s 2(1).

[10] The exception is Part IV, the purposes for which all PMEs are not regarded as employees, *ibid*, s 2(2).

[11] *Ibid*, s 35.

[12] *Ibid*, s 2(1).

[13] *Ibid*, First Schedule.

2.16. The table below clarifies the limits of the EA's scope.

Table 1: Scope of the Employment Act

	Part III- Payment of salary	**Part IV- Rest days, hours of work and other conditions of service**	**Part X- Holiday and sick leave entitlements**
Workmen	✓	Applies only if salary does not exceed $4,500	✓
Non-workmen (e.g. clerks, sales staff)	✓	Applies only if salary does not exceed $2,500	✓
Professionals, managers and executives (PMEs)	Applies only if salary does not exceed $4,500	✗	Applies only if salary does not exceed $4,500

2.17. The reason given for excluding seafarer from the coverage of the EA is that the nature of their duties requires them to work longer than the prescribed maximum hours of 8 hours per day.[14] Note that the meaning of "seafarer" has been clarified to exclude individuals who are not based at sea, such as those on land who do some work on ship, such as pilots, port workers, and persons temporarily employed on the ship during the period it is in port.[15]

2.18. Likewise, the justification given for excluding domestic workers is that the nature of domestic work is quite different from normal work, making it difficult to regulate employment conditions.[16] Instead, employment of foreign domestic workers is regulated under EFMA.

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[14] *Parliamentary Debates Singapore: Official Report*, vol 27 at col 651 (31 July 1968).

[15] *EA*, *supra* note 4, s 2(1).

[16] *Parliamentary Debates Singapore: Official Report*, vol 85 at col 998 (18 November 2008) [*Parliamentary Debates* vol 85].

ii. Employment of Foreign Manpower Act (EFMA)

2.19. EFMA prescribes the responsibilities and obligations of employers to migrant workers. EFMA does not provide direct right of civil action to these worker. Rather, it sets out employers' obligations towards them. EFMA covers all "foreign employees", which includes all foreigners, other than those who are self-employed, seeking or offered employment in Singapore.[17] This includes foreign domestic workers (FDW) who are excluded from the protection of the EA.

2.20. The Employment of Foreign Manpower (Work Passes) Regulations 2012 accompanies EFMA and prescribes conditions of employment for migrant workers in relation to their upkeep, maintenance and well-being before, during, and after their period of employment. The regulations are divided between employment conditions for domestic workers and all other workers. Part I and II of the Fourth Schedule pertain to the employment conditions of domestic workers, while Part III and IV relate to employment conditions of non-domestic workers.

2.21. Violations of EFMA are treated as either administrative infringements or criminal offences. The question of whether a migrant worker can bring a claim against their employer for a breach of a statutory duty upon violation of EFMA provisions has yet to be tested in the Singapore courts. However, one potential line of argument is that EFMA provisions constitute terms implied by statute to an employment contract, giving rise to a cause of action for breach of contract when an employer violates EFMA's provisions. This argument is in line with Parliament's stated intention for EFMA to provide basic protections for vulnerable migrant workers.[18] EFMA may also render certain contracts illegal.

2.22. Workers are also often charged for mandatory job training which is provided in training centres in their home countries and/or in Singapore.

[17] *EFMA*, *supra* note 5 at s 2. See Chapter 2, Section 8.VI. for the text of the law.

[18] *Parliamentary Debates* vol 85, *supra* note 16.

Table 2: Range of agent fees paid by Indian, Bangladeshi and Chinese workers

Nationality	Agent fees in home country
Indian	$6,000[19] – $7,000
Bangladeshi	$8,000 – $10,000
Chinese	$3,000 - $7,000 for construction workers. $8,000 to $10,000 for service sector workers,

2.23. In addition to fees paid to their home country agents, some migrant workers are also required to pay fees upon their arrival to agencies in Singapore. Under the Employment Agencies Rules 2011[20] employment agents are only permitted to charge placement fees of one month's salary per year of contract or validity of work pass, whichever is shorter, subject to a cap of two months' salary.[21] In practice, placement fees paid to local agents can range from $3,000 – $8,000 for non-domestic workers[22], while placement fees for domestic workers average $1,900, equivalent to about four months' salary.[23]

2.24. After the agent has matched a worker with an employer in Singapore, the employer must apply for a Work Permit or S Pass[24] for that worker before employing them. Upon approval of such application, the Ministry of Manpower (MOM) will issue an In-Principle Approval (IPA) setting out the employer name, the worker's monthly basic salary, and any allowance and deductions that may apply.[25]

2.25. The IPA is an administrative document issued by MOM, based on the employer or agent's application, and is itself not a contract of employment.[26] Even though

[19] All dollar figures stated in this chapter are in Singapore dollars unless otherwise noted.

[20] *Employment Agencies Rules 2011* (S 172/2011 Sing) [*Employment Agencies Rules*].

[21] *Ibid* at s 12(1)(a).

[22] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 2 at 26.

[23] Amelia Tan, "10 maid agencies face temporary ban", The Straits Times (13 April 2013) online: The Straits Times <http://www.straitstimes.com/>.

[24] See Chapter 3, Section 1.10 for work passes foreign workers commonly hold.

[25] See generally Singapore, Ministry of Manpower, Work Permit- Before you apply, (Singapore: Ministry of Manpower, 2012), online: Ministry of Manpower <http://www.mom.gov.sg/>.

[26] *Winsor Homes Ltd. v St. John's Municipal Council* 20 Nfld. & P.E.I.R. 361; 53 APR 361 (1978); Halsbury's Laws of England, Volume 22, 5th ed (Singapore: LexisNexis, 2012) at 191 ("It follows that, prima facie, there is no concluded contract where further agreement is expressly required [...] [I]f the parties have reached an agreement in principle only,

the worker may have knowledge of the terms of the IPA, as they should have obtained a copy in their native language, it may at best serve as evidence of the contract between the employer and the client, but it is not the employment contract.

2.26. Once they reach Singapore, workers may or may not sign a fresh contract with the employer. Where there is no new contract, the IPA may be one form of evidence that there is an agreement between the worker and their employer.

2.27. This convoluted process of cross-border job placement poses problems in identifying the enforceable agreement and pinpointing specific terms of the agreement. Possible scenarios include:

1) Multiple agreements with differing terms on salary;
2) Workers signing a contract without knowing what the terms are; and
3) The contract being void for illegality, as the employee does not have a valid work permit.

2.28. On the evidentiary level, the informal, i.e. unwritten, nature of employment arrangements and the power imbalance between employers and workers mean that documentation is often lacking or easily falsified by the employers.

C. Calculation of salary owed

2.29. Salary calculations are subject to the EA, EFMA and the general law of contract. References to salary in this section include i. basic pay, ii. overtime pay, iii. paid rest days, iv. paid sick leave, v. paid annual leave, vi. paid holidays, and other contractual terms relating to salary.

2.30. A worker's salary may be calculated by reference to monthly, daily, hourly or piece-rates (i.e. payment for each task of work completed). Calculations of gross and basic rates of pay for employees may depend on whether they are paid on a monthly or piece rate basis, and whether they work regular hours or perform shift work.

i. Calculation of salary owed for overtime work

2.31. It is mandatory to pay employees covered under Part IV of the EA for overtime work.[27] The overtime rate payable to a non-workman employee is capped at the monthly basic salary level of $2,250.[28]

2.32. A worker is entitled to payment for overtime if they, at the request of the employer, work more than 8 hours in one day,[29] or more than 44 hours in one

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it may be that the proper inference is that they have not yet finished agreeing, for instance: where they make their agreement subject to details or subject to contract; or where so many important matters are left uncertain that their agreement is incomplete" at para 268).

[27] For employees covered under Part IV of EA, see Section 2.13 - 2.15.

[28] *EA*, *supra* note 4, Fourth Schedule.

[29] *Ibid*, s 38(4). Where it is agreed under the contract of service that the worker is required to work less than 8 hours on one or more days of the week, or is required to work not more than 5 days in a week, the limit of 8 hours in one day may be exceeded. However, a worker cannot be required to work for more than 9 hours in one day or 44 hours in one week,

week.[30] Overtime work must be paid at a rate of no less than 1.5 times the employee's hourly basic rate of pay.[31] The formula for calculating overtime pay is as follows:

EA, *supra* note 4, s 38(1). In such an instance i.e. if requested by the employer to work more than 9 hours in one day or more than 44 hours in one week, the worker will be entitled to overtime pay.

[30] *Ibid*. Where it is agreed under the contract of service that the worker is required to work less than 44 hours in every alternate week, the limit of 44 hours in one week may be exceeded in the other week. However, a worker cannot be required to work more than 48 hours in one week or for more than 88 hours in any continuous period of 2 weeks. In such an instance, the worker will be entitled to overtime pay if requested by the employer to work more than 48 hours in one week, or more than 88 hours in any continuous period of 2 weeks.

[31] *Ibid*. For a worker's hourly basic rate of pay for calculation of payment due for overtime see *EA*, *supra* note 4 Fourth Schedule.

Table 3: Formulas for calculating overtime pay[32]

For workmen employed on a monthly rate of pay:		
1.5 x number of hours worked overtime	X	(12 x monthly basic rate of pay) / (52 weeks x 44 hours)
For non-workmen employed whose monthly basic rate of pay is less than $2,250:		
1.5 x number of hours worked overtime	X	(12 x monthly basic rate of pay) / (52 weeks x 44 hours)
For non-workmen employed whose monthly basic rate of pay is $2,250 or more:		
1.5 x number of hours worked overtime	X	(12 x $2,250)[33] / (52 weeks x 44 hours)

[32] Adapted from Tripartite Alliance for Fair & Progressive Employment Practices, *Guide on Employment Laws for Employers*, online: Tripartite Alliance for Fair & Progressive Employment Practices <http://www.tafep.sg/assets/files/Publications/Publication_GELE_ENG_LR1%20as%20of%20April%202014.pdf> [TAFEP *Guide*].

[33] *EA*, *supra* note 4, Fourth Schedule. The overtime rate payable to a non-workman employee is capped at the monthly basic salary level of $2,250, and thus calculated as such.

Table 4: Example of overtime pay calculation (workmen)[34]

Type of employee	Salary	Formula to calculate hourly basic rate	Calculation of hourly basic pay	No. of hours worked overtime	Overtime pay
Monthly rated	$800 per month	12 x Monthly basic rate of pay / 52 x 44	12 x $800 / 52 x 44 = $4.20	2 Hours	$4.20 x 1.5 x 2hrs = $12.60
Daily rated	$20 per day	Daily pay at the basic rate / Daily hours of work	$20 / 8 = $2.50	2 Hours	$2.50 x 1.5 x 2hrs = $7.50

[34] TAFEP *Guide*, *supra* note 32.

Table 5: Example of Overtime Pay Calculation (Non-workmen) [35]

Type of employee	**Salary**	**Formula to calculate hourly basic rate**	**Calculation of hourly basic pay**	**No. of hours worked overtime**	**Overtime pay**
Monthly rated	$1,600 per month	12 x Monthly basic rate of pay / 52 x 44	12 x $1,600 / 52 x 44 = $8.40	4 Hours	$8.40 x 1.5 x 4hrs = $50.40
Monthly rated	$2,250 per day	12 x Monthly basic rate of pay / 52 x 44	12 x $2,250 / 52 x 44 = $11.80	2 Hours	$11.80 x 1.5 x 2hrs = $35.40
Monthly rated	$2,400 per day	12 x $2,250[36] / 52 x 44	12 x $2,250 / 52 x 44 = $11.80	2 Hours	$11.80 x 1.5 x 2hrs = $35.40

[35] *Ibid*.

[36] *EA*, *supra* note 4, Fourth Schedule. The overtime rate payable to a non-workman employee is capped at the monthly basic salary level of $2250, and thus calculated as such.

ii. Calculation of salary owed for an incomplete month of service or work

2.33. Salary payable to a monthly-rated employee for an incomplete month of work is calculated using the following formula:[37]

$$\text{Salary payable} = \frac{\text{Monthly gross rate of pay}}{\text{Total no. of working days in that month}} \times \text{Total no. of days the employee actually worked in that month}$$

2.34. Monthly gross rate of pay refers to the total amount of money, including allowances payable to an employee for working for one month, but excluding:

1) Additional payments by way of overtime payments, bonus payments, or annual wage supplements;
2) Any sum paid to the employee for reimbursement of special expenses incurred by them in the course of employment;
3) Productivity incentive payments; and
4) Travelling, food, or housing allowances.[38]

2.35. Total number of working days in that month excludes rest days and non-working days but includes public holidays.[39]

2.36. Total number of days the employee actually worked in that month includes public holidays, paid hospitalisation leave, or annual leave if entitled.[40]

2.37. A working day with more than 5 hours is regarded as one working day, while one with 5 hours or fewer is considered as half a working day.[41]

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[37] *Ibid*, s 20A(1).

[38] *Ibid*, s 2(1).

[39] TAFEP *Guide*, *supra* note 32.

[40] *Ibid*.

[41] *EA*, *supra* note 4, s 20A(2).

iii. Calculation of salary owed for work done on rest days

2.38. Employees covered under Part IV of the EA[42] are entitled in each week to a rest day of one whole day without pay.[43] The rate of pay may be higher for work done on a rest day.

2.39. The amount payable depends on the work duration and whether the request to work was from the worker or the employer. The overtime rate payable to a non-workman employee is capped at the monthly basic salary level of $2,250.[44]

Table 6: Formula for calculating payment due for work done on rest days[45]

	Duration of work		
	Not more than half of normal hours of work for one day	**More than half, but not exceeding normal hours of work for one day**	**More than normal hours of work for one day**
Employee works on rest day at his own request	Half day's basic salary	One day's basic salary	1. One day's basic salary; and 2. Overtime pay of at least 1.5 times hourly basic rate of pay x No. of overtime hours worked
Employee works on rest day at employer's request	One day's basic salary	Two day's basic salary	1. Two days' basic salary; and 2. Overtime pay of at least 1.5 times hourly basic rate of pay x No. of overtime hours worked

[42] For employees covered under Part IV of EA, see Section 2.14.

[43] *Ibid*, s 36.

[44] *Ibid*, Fourth Schedule.

[45] Adapted from TAFEP *Guide*, *supra* note 32; *EA*, *supra* note 4, s 37.

iv. Paid sick leave entitlement

2.40. This section covers general paid sick leave entitlement under the EA. This should be distinguished from medical leave wages that may be claimed under the Workplace Injury Compensation Act[46] (WICA), which is specific to medical leave wages associated with workplace injury. To calculate payable wages for clients on workplace injury related medical leave, see instead Chapter 2, Section 5, Table 14.

2.41. All employees covered under the EA are entitled to paid sick leave if they fulfil the following requirements:

1) Have worked with their employer for at least 3 months;[47]
2) Have obtained a medical certificate from the company doctor. If the Company doctor is not available, the employee may obtain the medical certificate from a government doctor;[48] and
3) Have informed the employer of the sick leave within 48 hours.[49] The number of days of paid sick leave that the worker is entitled to depends on their service period:

Table 7: Number of days of paid sick leave entitlement[50]

No. of months of service completed	Paid outpatient sick leave (working days)	Paid hospitalisation leave (working days)[51]
3 months	5	15
4 months	8	30
5 months	11	45
6 months and above	14	60

2.42. If the employee has worked for at least three months, the employer is legally obliged to bear the medical examination fee, i.e. medical consultation fee. For other medical costs such as medication, treatment or ward charges, the

[46] *Work Injury Compensation Act* (Cap 354, 2009 Rev Ed Sing) [*WICA*].

[47] *Ibid*, s 89(2).

[48] *Ibid*, s 89(1), s 89(2). Visit www.mom.gov.sg for the list of approved public medical institutions.

[49] *Ibid*, s 89(4).

[50] Adapted from TAFEP *Guide*, *supra* note 32; *EA*, *ibid* note 4, s 89(1), 89(2).

[51] This includes any outpatient sick leave if taken.

employer may be obliged to bear such costs depending on the medical benefits provided for in the employee's employment contract.[52]

v. **Paid holiday leave entitlement**

2.43. Employees are entitled to a paid holiday at their gross rate of pay for the days specified in the Holidays Act[53] that fall during the time they are employed.[54] If the holiday falls on rest day, the next working day following that rest day shall be a paid holiday.[55]

2.44. An employee who is required by his employer to work on any specified public holiday is entitled to an extra day's salary at the basic rate of pay for one day's work in addition to the gross rate of pay for that day.[56]

vi. **Paid annual leave entitlement**

2.45. Employees covered under Part IV of the EA are entitled to paid annual leave if they have served for at least three months.[57]

2.46. Annual leave entitlement is subject to agreement between the worker and employer. However, it should not be less than that prescribed by the EA, which is as follows:

Table 8: Number of days of paid annual leave entitlement[58]

Years of continuous service	Days of leave
1st	7
2nd	8
3rd	9
4th	10
5th	11
6th	12
7th	13
8th and thereafter	14

[52] TAFEP *Guide*, *supra* note 32.

[53] Public holidays in Singapore are: New Year's Day, Chinese New Year (two days), Hari Raya Puasa, Hari Raya Haji, Good Friday, Labour Day, Vesak Day, National Day, Deepavali, and Christmas Day, *Holidays Act* (Cap 126, 2006 Rev Ed Sing), The Schedule.

[54] *EA*, *supra* note 4, s 88(1).

[55] *Ibid.*

[56] *Ibid*, s 88(4).

[57] *Ibid*, s 43. For employees covered under Part IV of EA, see Section 2.14.

[58] Adapted from TAFEP *Guide*, *supra* note 32; *EA*, *supra* note 4, s 43(1).

2.47. Employees who have served for a period of more than 3 months, but less than one year are entitled to annual leave in proportion to the number of completed months of work in that year.[59]

II. Common examples of salary disputes

2.48. Disputes on salary typically fall under one of two categories: A. where the rate of pay agreed upon is undisputed and the aim is simply to claim for a debt owed, or B. where the rate of pay is disputed due to the existence of multiple conflicting terms on salary.

A. Where a clear term on salary exists

2.49. Where there is an undisputed written or oral contractual term on the rate of pay, the focus may be on the factual issue of showing that such sums of salary were not paid to the client by the employer. Below are examples of situations where a clear contract term can be found:

i. Written contract

2.50. A worker signs a contract with an employer. The worker understands all the terms of the contract, which are consistent with the stated salary in the IPA. The employer is not able to pay the employee their full salary for several months. The employer delays paying the worker the full salary owed to them, until the company closes down. The worker is no longer employed, and is owed salary arrears. However, there is no practice of issuing receipts upon payment of salary, and the worker faces difficulty in showing that they were underpaid for several months.

ii. Oral contract

2.51. The worker is orally promised a higher salary than is stated in their IPA. The employer consistently pays them the higher salary, which is also recorded in payslips. The worker's salary is delayed for a few months. Eventually the company closes down. The worker is no longer employed, and is owed several months in salary arrears.

B. Where there is no clear term on salary

2.52. Where there are multiple conflicting terms of salary, the primary issue is identifying the enforceable terms.

2.53. Multiple contractual terms on salary may arise during the process of recruitment as detailed above in Chapter 2, Section 2.II.B. Identifying the enforceable contractual terms may depend on the circumstances under which the agreement was purportedly reached, the nature of the agreement, the substance of the contractual terms, and the parties' subsequent course of conduct. Below are examples of circumstances under which multiple

[59] *EA*, *supra* note 4, s 43(2). In calculating the proportionate annual leave entitlement, fractions of less than half a day should be disregarded, while fractions of half or more should be considered as one day, *EA*, *supra* note 4, s 43(3).

agreements may arise and the circumstances under which written agreements may be obtained:

i. **Multiple agreements reached with different parties containing different terms on salary**

2.54. The worker signs a contract with an agent in their home country. The contract states that the worker's salary will be $X. Their IPA also states that they are to be paid a basic salary of $X. Upon arriving in Singapore, the employer or agency makes the worker sign a contract which states that they will be paid a basic salary of $Y, which is lower than $X.

ii. **Worker signed contract without understanding the meaning of the terms**

2.55. The worker's IPA provides for a basic salary of $X. Upon arriving in Singapore, the employer B makes them sign a contract in English, which the worker cannot read. The contract states that the worker will be paid a basic salary of $Y, which is lower than the $X provided for in the IPA.

2.56. The worker's IPA provides for a basic salary of $X. Upon arriving in Singapore, the employer forces them to sign a blank piece of paper. Later, the employer fills the paper with a contract which states that their basic salary is $Y, which is lower than the $X provided for in the IPA.

2.57. The worker's IPA provides for a basic salary of $X. Upon arriving in Singapore, the employer forces them to sign a contract which is folded over such that they are not able to read the terms of the contract. The contract states that the worker will be paid a basic salary of $Y, which is lower than in the $X provided for in the IPA.

III. Remedies and rules

2.58. Innumerable varieties of fact situations relating to agreements on salary may arise. Each client's objective may be different—one client may wish to enforce a contract signed in Singapore which promises a higher salary than their IPA, while another client may wish to void the contract signed in Singapore and enforce instead a contract signed in their home country.

2.59. This section lays out the various objectives that a client may wish to achieve, and the causes of action that are available to reach such an outcome. Possible objectives of a client covered under this section are: A. claiming for contractual debt on the basis of a written contract; B. enforcing an oral promise; C. voiding a contract; D. enforcing a contract signed overseas; E. enforcing the employment contract of a worker who does not have a valid work pass; and F. identifying enforceable terms where they are vague and/ or conflicting. Each part includes a legal definition, elements of the claim, and an evaluation of the potential effectiveness of the claim in the migrant worker context.

A. Claiming for contractual debt on the basis of a written contract

2.60. Where a clear written contract exists, the client may claim for arrears on the basis of terms in the written agreement.

2.61. The difficulty may lie in proving the non-payment of salary. Payslips or bank statements are typically taken as proof of payment. However, such records are easily falsified by unscrupulous employers.

i. Bringing an action for debt on the basis of the written agreement

Definition

2.62. Where a contract provides for payment of some amount of money in consideration for the other party performing services, then the party performing a service is entitled to this money upon completion of service. Should the paying party default, the performing party's remedy is a debt action to collect the contract sum.

2.63. Where the contract terms provide for payment portions for each stage of performance, (i.e. the contract is divisible) the claimant can sue for each part of the contract price as the relevant work is completed.[60] Workers usually have divisible contracts as they typically contract for monthly, hourly, or piece-rate salaries.[61]

Elements

2.64. First, the client must prove the existence of the term of the contract stipulating their contractual rate of pay. This can be done by producing the written contract. If there is no written contract, see Section 2.III.B. in this chapter on oral agreements.

2.65. Next, the client must prove that the debt exists by providing documentation to show that they have worked the number of hours for which they are claiming payment, such as the client's timesheet. Unfortunately, workers often do not have access to their own documentation as it is usually held by their employers. Unscrupulous employers may also forge documents.

2.66. The next best alternative is to provide the client's personal record of hours worked. If the client is still employed, they should be advised to keep their own record of the hours worked. Original documents are required (i.e. not photocopies or print outs).

2.67. The client must then give testimony that they have not been paid their salary for the hours worked.

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[60] *MP-Bilt Pte Ltd v Oey Widarto*, [1999] 1 SLR(R) 908 [55]; [1999] SGHC 70 [*MP-Bilt*].

[61] The EA treats employment contracts as divisible as evident from the formulas for the calculation of salary. Under the EA, a worker paid on a monthly basis may bring a claim for any outstanding salary due in respect of the number of days actually worked, as well as salary for half a day where they worked 5 hours or less, where the period in question constitutes less than one month, *EA*, *supra* note 4 at s 20As. Overtime pay is calculated on an hourly basis irrespective of the basis on which the client's rate of pay is fixed, *EA*, *supra* note 4 at s 37.

2.68. The evidentiary burden then shifts to the employer to prove payment as a defence to the client's claim for a debt, where consideration has been provided in the form of services rendered. A debt once proved to have existed is presumed to continue unless payment or discharge can be proven or established by circumstance to be more likely than not.[62]

2.69. The mere fact that the employer is able to produce receipts or payslips is not determinative proof that payment has been made. Improbabilities may still render the burden insufficiently discharged.[63] Facts that may undermine the employer's account will be specific to each case.

Evaluation of bringing an action for debt

2.70. Even if the client keeps the contract alive[64] by continuing to work despite the employer's continued breach of contract by paying at a lower rate, the client can recover any instalments already accrued as debt after performance. The client is not under a duty to mitigate in a claim for debt.[65] However, it must be clear that the client's continued performance is an affirmation of the contract at the previously agreed upon rate of pay, and not an affirmation of the lower rate of pay as a revised term of the contract.

2.71. Bringing a claim for contractual debt is open to all workers as long as they have a legal contract of service with an employer. For enforcing illegal contracts, see Section 2.III.E.

B. Enforcing oral promises made by an employer

2.72. Clients may wish to enforce oral promises made by their employer. This may occur where employers orally promise clients a higher salary than stated in the IPA, where no written agreement of any kind exists; or where employers make oral promises outside of the written contract, such as bonus payments. Alternately, the client may wish to bring an action for damages for misrepresentation by the employer. The challenge in both cases lies in proving the existence of the oral promise.

i. Bring an action for debt on the basis that the verbal promise by the employer is an oral term of the contract

2.73. Employees may seek to recover contractual debt by claiming that verbal promises were terms of an oral contract, or of a partly written, partly oral contract.

2.74. The EA recognises oral contracts of service, whether express or implied.[66] Courts will also recognise partly oral, partly written contracts of service.[67]

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[62] *Young v Queensland Trustees Limited*, [1956] HCA 51. See Chapter 2, Section 8.II. for a case summary.

[63] *Ibid*.

[64] *MP-Bilt*, supra note 60 [57].

[65] *Ibid* at [20].

[66] *EA*, *supra* note 4 at s 2(1). See Chapter 2, Section 8.IV. for the text of the law.

[67] *Carmicheal v National Power Plc*, [1999] ICR 1226 [*Carmicheal*]. See Chapter 2, Section 8.IV for a case summary.

Elements

2.75. In order to bring an action for debt based on an oral promise, plaintiffs must show that 1) the statement is an express term of the contract, and not a mere representation external to the contract and 2) the statement liable to become a term was incorporated into the contract.[68] Both elements will be discussed in detail below.

2.76. Including evidence of unwritten, oral promises into evidence is possible, provided that not all of the terms have been written into the contract. This is known as the "parole evidence" rule, and is enshrined in the Evidence Act.[69] However, some contracts include a provision stating that the written terms comprise the entire contract (known as "entire agreement" clauses). In such cases, it is far more difficult to admit evidence of additional oral provisions.

2.77. Testimony by the employer and worker can be sufficient to prove that an oral term exists regarding salary. In previous cases, the finding of oral terms has been made based on testimony given by an executive director[70] and a manager.[71]

2.78. Oral terms may also be implied by subsequent conduct. It is not necessary to rely on memory of the precise conversation. When both parties agree about what they understood their mutual obligations to be, this evidence may be taken into consideration.[72] Mutual understanding of an oral agreement can be implied from a course of dealing, such as a pattern of payment of the promised sum over a period of time. In one case, a contract of service was implied by the defendant's subsequent conduct of allowing the plaintiff to work at his place of employment and paying the plaintiff salary for two months.[73]

Differentiating an express term from a representation

2.79. Even if what the employer promised can be clearly established, it does not necessarily follow that it has been incorporated into the contract. Statements made during negotiations may be either mere representations, or, in the alternative, they may be legally binding terms of the contract.

2.80. A term is a promise for which the employer assumes contractual responsibility, while a representation is a statement which simply asserts the truth of past or present facts, and induces a person to enter into a contract. Representations, if real at the given point of time, do not legally bind the representor and they can go back on their representation.[74]

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[68] Andrew B.L. Phang and Goh Yihan, *Contract Law in Singapore*, (Singapore: Kluwer Law International, 2012) at para 1009, para 1012 [Phang and Goh, *Contract Law in Singapore*].

[69] *Evidence Act* (Cap 97, 1997 Rev Ed), s 94.

[70] *Melaka Farm Resorts (M) Sdn Bhd v Hong Wei Seng*, [2004] 6 MLJ 506 at [13] [*Melaka Farm Resorts*]. See Chapter 2, Section 8.IV. for a case summary.

[71] *Ibid.*

[72] *Carmichael*, *supra* note 67.

[73] *Melaka Farm Resorts*, *supra* note 70.

[74] *Kleinwort Benson Ltd v Malaysia Mining Corporation BHD*, [1989] 1 WLR 379. See Chapter 2, Section 8.X. for a case summary.

2.81. There are several factors which aid in differentiating between terms and representations, including a) the parties' objective intentions; b) stage of the transaction at which the crucial statement was made; c) reduction of the terms of contract to writing; and d) special knowledge the employer had about the employment.

a) Intentions of the parties as objectively determined

2.82. Simply stating that a fact is true without a promise (or "warranty") of its truth is only a representation. The employer must intend to give their guarantee on the truth of the fact.[75]

2.83. If a representation is made in the course of dealings for a contract for the very purpose of inducing the client to enter into the contract, there is a prima facie reason for inferring that the representation was intended as a warranty, i.e. that the employer intends to give their guarantee on the truth of the fact.[76]

2.84. The employer can rebut this inference if they can show that they were innocent of fault in making the statement, due to it being unreasonable in the circumstances for them to be bound by it because they were not in a position to find out the truth.[77]

b) Stage of the transaction at which the crucial statement was made

2.85. The statement must be designed as a term of the contract and not merely incidental to the preliminary negotiations.

2.86. If the statement was made close to the formation of the contract, it is more likely to be deemed a term of the contract.[78]

c) Reduction of the terms of contract to writing

2.87. It is necessary to consider if the oral statement was followed by a reduction of the terms to writing.

2.88. If parties intended the contract to be partly written, partly oral, the statement may be an oral warranty collateral to the written contract,[79] i.e. there is an oral guarantee that is part of the entire contract. The oral statement would thus be considered to be an oral term of the contract, rather than a representation external to the contract.

d) Special knowledge of employer

2.89. Where information asymmetry exists, (i.e. one party knows more than the other) courts tend to decide against the party with special knowledge, who is in a better position to discover the truth.[80] Employers almost always have more knowledge about the conditions of employment than the employees do.

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[75] *Oscar Chess Ltd v Williams*, [1957] 1 All ER 325. See Chapter 2, Section 8.X. for a case summary.

[76] *Dick Bentley Productions v Harold Smith Motors*, [1965] 2 All ER 65 [Dick Bentley]. See Chapter 2, Section 8.X. for a case summary.

[77] *Ibid*.

[78] *Bannerman v White*, [1861] 10 CBNS 844. See Chapter 2, Section 8.X. for a case summary.

[79] *Birch v Paramount Estates Ltd*, [1956] 167 Estates Gazette 396. See Chapter 2, Section 8.X. for a case summary.

[80] *Dick Bentley*, *supra* at note 76.

2.90. Once the oral term can be proven, the client can claim contractual debt under that term. Refer to Section 2.III.A.i. which discusses bringing an action for debt.

Evaluation of bringing an action for debt on oral terms:

2.91. An oral term is easier to prove where there is evidence, such as payslips from previous payments or recordings of conversations.

2.92. Even if the client keeps the contract alive[81] by continuing to work despite the employer's continued breach of contract by paying at a lower rate, the client can recover any instalments already accrued as debt after performance. The client is not under a duty to mitigate in a claim for debt.[82]

2.93. This rule will only help the client recover instalments of payment for services already rendered. If the claimant desires to claim future payments in advance, they must accept repudiation of the contract and sue for damages, which subjects them to rules governing mitigation.

2.94. Bringing a claim for contractual debt is open to all workers as long as they have a legal contract of service with an employer. For enforcing illegal contracts, see Section 2.III.E.

ii. **Bring an action for damages for misrepresentation by the employer**

Definition

2.95. An action for misrepresentation may be more appropriate where a verbal statements is not a term of the contract, but instead a statement of past or existing fact which materially induced the client to enter the employment contract.

Elements

2.96. To establish misrepresentation, the following elements must be found 1) a statement of fact is made by one contracting party to another; 2) the statement is in fact false; and 3) the statement materially induces the innocent party into entering the contract.

1) A statement of fact is made by one contracting party to another

2.97. Only a statement of fact can amount to an operative misrepresentation. A statement of fact must be distinguished from statements of intention, statements of opinion, which are described below, as well as sales puffs (advertising exaggerations about the qualities of a product or service).[83] Some of the relevant factors in determining what constitutes a statement of fact include: contracting parties' knowledge, relative positions of contracting parties, words used, and nature of the subject matter in the contract.

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[81] *MP-Bilt*, *supra* note 60 at [57].

[82] *Ibid* at [20].

[83] *Deutsche Bank AG v Chang Tse Wen*, [2012] SGHC 248 [*Deutsche Bank*]. See Chapter 2, Section 8.IX. for a case summary.

Distinguishing statements of fact from statements of opinion

2.98. A statement of opinion is a subjective judgment that does not state the truth of the matter. It is not actionable even if the opinion turns out to be inaccurate.[84]

2.99. For example, a statement by an agent that, in their own judgment, the employer is a good employer, is merely an expression of opinion, if honestly held.

2.100. An exception is if there is an imbalance in knowledge which would allow the courts to imply a factual representation of reasonable grounds for such an opinion.[85]

2.101. If an agent makes the same statement above, despite knowing that the employer has failed to pay the salaries of their employees for several months, the statement may be actionable as against the agent on the basis that the agent impliedly states that he knows facts which justify his opinion.

Distinguishing statement of fact from statement of intention

2.102. While a statement of fact alludes to a past or existing fact, a statement of intention or prediction refers to future conduct and is usually not actionable for misrepresentation.

2.103. An employer may state that there will be overtime work for the employee every week. This may merely be a prediction of the availability of work, and not a guarantee of overtime work for the employee.

2.104. However, a statement of intention could constitute a promise, and if it becomes a term of the contract, failure of the employer to perform may amount to a breach. See Section 2.III.B.i. on bringing an action for debt on an oral term of the contract.

2.105. Embedded within a statement of intention is a statement of fact which impliedly represents the employer's state of mind. If the employer had falsely represented (i.e. lied about) his intention at the time the representation was made, there is a false representation of an existing fact, which qualifies as misrepresentation and is therefore actionable.[86]

2) The statement is in fact false

2.106. Generally, there must be an unambiguous false statement of fact to constitute an operative misrepresentation.

Half-truths can amount to misrepresentation

2.107. A statement that is true, but omits materials facts and thereby creates a false impression which misleads the client can constitute an operative misrepresentation.[87]

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[84] *Bisset v Wilkinson*, [1927] AC 177 NZ Privy Council. See Chapter 2, Section 8.IX. for a case summary.

[85] *Smith v Land & House Property Corporation*, [1884] 28 Ch D 7. See Chapter 2, Section 8.IX. for a case summary.

[86] *Deutsche Bank*, supra note 34; *Edgington v Fitzmaurice*, [1885] 29 Ch D 459. See Chapter 2, Section 8.IX. for a case summary.

[87] *Dimmock v Hallett*, [1866] 2 Ch App 21. See Chapter 2, Section 8.IX. for a case summary.

Continuing duty to correct representation when circumstances change

2.108. There is a continuing duty to correct a representation when there is a change of circumstances which would make the representation false. Silence can amount to an operative misrepresentation where such duty to disclose or correct arises.[88]

Misrepresentation can be found through conduct

2.109. An implied misrepresentation can be inferred from the employer's conduct.[89]

Wilful suppression of material facts can amount to misrepresentation

2.110. While mere silence is generally insufficient to amount to an operative misrepresentation where there is no duty to disclose, silence can constitute misrepresentation if there is active concealment of important facts that if revealed would render statements untrue.[90]

3) Material inducement

2.111. An employer's false statement must have materially induced the employee to enter the contract. The statement need not be the only inducement; it merely needs to be relevant to the contract.

2.112. There is inducement if the client:

a) Is aware of the statement;
b) Does not know that the statement is untrue;
c) Relied on the statement;[91] and
d) Does not have reasonable grounds for doubting the accuracy of the statement. The fact that the client could have verified the accuracy of the statement is not fatal to the claim.[92]

Remedies

2.113. Two remedies are available upon proof of misrepresentation:

1) The client may rescind the contract as a result of the misrepresentation.
2) The employee may sue for damages on the basis of being induced to enter into the contract by the misrepresentation.

2.114. Several types of misrepresentation exist and are discussed below. These are: 1) fraudulent misrepresentation; 2) negligent misrepresentation; 3) statutory action for negligent misrepresentation; and 3) innocent misrepresentation. Remedies available to the client depend on the type of misrepresentation found.

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[88] *With v O'Flanaghan*, [1936] Ch 575. See Chapter 2, Section 8.IX. for a case summary.

[89] *Spice Girls Ltd v Aprilla World Service BV*, [2002] EMLR 27. See Chapter 2, Section 8.IX. for a case summary.

[90] *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)*, [2003] 3 SLR 501. See Chapter 2, Section 8.IX. for a case summary.

[91] *Holmes v Jones*, (1907) 4 CLR 1692; *Leow Chin Hua v Ng Poh Buan*, [2005] SGHC 39. See Chapter 2, Section 8.IX. for a case summary.

[92] *Redgrave v Hurd*, [1881] 20 Ch D 1; *Jurong Town Corporation v Wishing Star Ltd*, [2005] 3 SLR 283 SGCA. See Chapter 2, Section 8.IX. for a case summary on *Redgrave v Hurd*.

1) Misrepresentation: fraudulent misrepresentation

Definition

2.115. Fraudulent misrepresentation, or the tort of deceit, is a cause of action under tort law.

2.116. A fraudulent misrepresentation is the "wilful making of a false statement with the intent that the client shall act in reliance upon it and with the result that they do so and suffer damage inconsequence."[93]

Elements

2.117. The false statement must have been made:

a) Knowingly;
b) Without belief in its truth; or
c) Recklessly, carelessly as to whether it be true or false.[94]

Remedy

2.118. There are two remedies open to the client: a) rescind the contract and recover any money paid in reliance upon the misrepresentation; and b) claim all damages resulting from the misrepresentation.

a) Remedies for fraudulent misrepresentation: rescind the contract and recover reliance interest

2.119. Rescission treats the contract as if it never existed, with remedies intended to financially restore the parties to their pre-contract positions.

2.120. The contract being rescinded in this context is the contract of service between the employer and the client. The sums to be recovered must have been paid in reliance upon the misrepresentation. Hence, what can be recovered depends on the timing at which the misrepresentation was made by the employer to the client.

2.121. If the employer directly contacted the client while they were still in their home country and made the misrepresentation at that point, the client may be able to recover such expenses as:

- Training centre fees;
- Transportation fees; and
- Any other fees paid to the employer or MOM in coming to Singapore.

2.122. However, it is more often the case that the client first contacts an employment agency in their home country, instead of directly contacting the employer. In this situation, it is arguable that the employer is still responsible for the fraudulent misrepresentation because a principal-agent relationship exists between the employment agency and the employer.

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[93] *Kea Holdings Pte Ltd v Gan Boon Hock*, [2000] 2 SLR(R) 333.

[94] *Derry v Peek*, [1889] 14 App Cas 337. See Chapter 2, Section 8.VII. for a case summary.

2.123. Agency is the relationship which arises where one person (the agent) acts for another (the principal). Through the acts of the agent, the principal and a third party may be brought into a contractual relationship. The agent has such a power because the principal has authorised the agent to do the acts in question and the agent has agreed.

2.124. Here, it could be argued that the employment agency is the agent acting between the client (the third party) and the employer (the principal).

2.125. Hence, if the agent acted within the employer's authority, the employer may be held liable for any misrepresentation made by the employment agency. If so, in addition to the fees listed above, the employer could also be liable for agent fees, which were paid in reliance on false statements made by the employment agency within the employer's authority. Note that at the time of publication, this legal argument has not been attempted in this context in Singaporean courts. Thus, strategic litigation will be necessary to establish whether this is a viable line of argument.

2.126. If no principal-agent relationship can be established between the employment agency and the employer, or the agent acted outside of the employer's authority, the employer will not be liable for misrepresentations made by the employment agency. The claim for fraudulent misrepresentation may be brought against the employment agency directly. In such a case, tort must be proved against the agency.[95] Alternatively, the client may bring a claim for breach of warranty by the employment agency that they were acting within the authority of the employer.

2.127. In that case, the client's claim against the employer will be limited to any misrepresentations made by the employer themselves while the client was present in Singapore. Any fees or costs incurred in the home country will thus be unrecoverable in Singapore (although potentially recoverable in the client's home country). The client can only claim for any sums paid after the employer's misrepresentation.

2.128. To rescind the contract, the client must clearly and unequivocally communicate their decision to rescind the contract to the employer. Communication of rescission can be express or implied and can be by conduct, but where possible, workers should try to document proof of the conversation by:

- Voice recording the conversation; or
- Videoing the conversation; and
- Ensuring the other party states their name and identification.

Limits to rescission

2.129. Bars against rescinding the contract are:

i. The client affirming (i.e. agreeing to) the contract after becoming aware of the falsity of the misrepresentation;
ii. Impossibility of restitution; or
iii. When the right to rescind is not exercised within a reasonable time.

[95] *MP-Bilt*, supra note 60 at [21].

2.130. Thus, an action to rescind a contract should be brought where the client sought legal help as soon as possible after discovering that the employer misrepresented employment conditions. If the client performs the contract by working despite learning about the employer's misrepresentation, his actions could be taken as an affirmation of the contract i.e. agreeing to the contract despite the misrepresentation.

b) Remedies to fraudulent misrepresentation: Client can claim all consequential damages flowing from misrepresentation

2.131. Damages for fraudulent misrepresentation can be claimed even if the contract is rescinded.[96]

2.132. The award of damages for fraudulent misrepresentation aims to put the claimant in the position in which they would have been had the tort not been committed. The client can recover losses which they would have avoided if the employer had been truthful, including direct and consequential losses[97] flowing from the misrepresentation.[98] This includes all losses that resulted directly from the client entering into the contract in reliance on the fraudulent misrepresentation, regardless of whether such loss was foreseeable.[99]

2) Misrepresentation: statutory action for negligent misrepresentation

2.133. The Misrepresentation Act supplements the negligent misrepresentation under tort law.

Elements

2.134. The client must prove that:

a) They entered into the contract due to misrepresentation; and
b) They suffered loss as a result.

2.135. Upon establishing these elements, the agent or employer will bear the burden of proving that they had reasonable grounds to believe, and did believe up to the time that the contract was made, that their statement was true.[100]

Remedy

2.136. As statutory tort action, this claim entitles the claimant to the same measure of damages as fraudulent misrepresentation.[101] Unlike damages for the tort of

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[96] Phang and Goh, *Contract Law in Singapore*, *supra* note 68 at para 510.

[97] Direct damages are damages that result directly from the breach of contract, while consequential remedies are losses that the parties would have reasonably expected to be the probable result of such a breach. For example, direct loss from a contractor's late completion of a project in breach of a contract may be the cost to complete the unfinished work, while the consequential losses would be the loss of operating revenue due to the late completion.

[98] *Wishing Star Ltd v Jurong Town Corp*, [2008] 2 SLR(R) 909 [21] – [26].

[99] *Ibid*, at [28].

[100] *Misrepresentation Act* (Cap 390, 1994 Rev Ed Sing), s 2(1).

[101] *Ibid*.

negligence, claims under the Misrepresentation Act are not restrained by whether damages were foreseeable by the employer or agent.

2.137. Rescission may be granted at the court's discretion and is subject to the bars listed in paragraph 2.129.

3) Misrepresentation: innocent misrepresentation

2.138. Where the misrepresentation was made without the requisite fault under fraudulent or negligent misrepresentation, the court has discretion to allow the contract to be rescinded or to award damages in lieu of rescission.[102]

Evaluation of bringing an action for misrepresentation

2.139. Misrepresentation is useful where the statement made is too vague to constitute an enforceable term of contract.

2.140. An action for misrepresentation is viable where evidence of an actual statement by the employer is available, such as recordings of actual conversations. It requires evidence of the actual statement made, which is more difficult to show compared to an oral term which can be implied from a consistent course of conduct.

2.141. The remedy of rescission may be barred where reasonable time has lapsed and there is conduct that can be taken as affirmation of the contract.

C. Voiding a contract

2.142. Workers may be coerced into signing fresh contracts with less favourable terms upon their arrival in Singapore. The client may wish to void contracts entered into under duress in order to enforce a more favourable contract that may have been signed earlier.

i. Voiding the contract on the basis of economic duress

2.143. Duress is a factor which renders a contract voidable. Economic duress is the most common form of duress exercised against migrant workers.

2.144. Economic duress presents itself most often in the form of unilateral contract modifications, where the employer threatens to breach an existing contract unless the client agrees to change the contract by accepting less than what was originally promised.

Elements

2.145. There are three elements required to prove economic duress: [103]

1) The threat or the demand accompanying the threat made by the employer is in a manner as to render the pressure illegitimate;
2) The client was affected by the threat such that their will was coerced.[104]

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[102] *Ibid*, s 2(2).

[103] Phang and Goh, *Contract Law in Singapore*, *supra* note 68 at para 562.

[104] *Huyton SA v Peter Cremer GmbH & Co*, [1998] EWHC 1208 (Comm).

2.146. Where the employer threatens to breach the employment contract, proof of bad faith can be an important factor in inferring illegitimate pressure.[105] A threat that is aimed at exploiting the client's weak bargaining position rather than solving financial or other problems of the employer is one form of acting in bad faith.[106]

2.147. An employer's lawful threat to terminate the contract in accordance with the EA may nevertheless be illegitimate and constitute 'lawful act duress' where:

1) The threat involves an abuse of the legal process;
2) The demand is not made in good faith;
3) The demand is unreasonable; or
4) The threat is considered unconscionable.[107]

2.148. However, Singapore courts are cautious in finding lawful an act of duress unlawful. Where the threat of termination is itself lawful, it is relatively rare that it will be regarded as illegitimate so as to constitute duress.[108]

2.149. The option of rescinding the contract is subject to the bars against rescission. See the Section 2.129.

D. Enforcing a contract signed overseas

2.150. Workers may sign contracts in their home countries. These may be with employers or employment agencies in Singapore, stipulating certain employment terms which the client may wish to enforce.

2.151. The main issue is whether Singapore has jurisdiction to enforce a contract signed overseas. The two basic concepts that underlie the determination of jurisdiction in cross-border disputes are:

1) There must be a legal connection between the case or the defendant (here, the employer) and Singapore for jurisdiction to exist; and
2) Singapore should be the most appropriate forum for the dispute, taking into account the degree of connection between the case and Singapore, compared with the degree of connection that might exist between the case and other countries.[109]

2.152. The court's jurisdiction is determined by the proper law of the contract. There are three ways in determining the proper law of the contract:

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[105] Nicholas Seddon, *Cheshire & Fifoot's Law of Contract/ Cheshire & Fifoot's Law of Contract*, 9th ed (Chatswood, N.S.W: LexisNexis Butterworths, 2008) at 708.

[106] A.S. Burrows, *The Law of Restitution*, 2nd ed (UK: Butterworths, 2002) at 233.

[107] These 4 factors were applied by the Singapore High Court in *Tam Tak Chuen v Khairul bin Abdul Rahman and Others* [2009] 2 SLR 240; [2008] SGHC 242. See Chapter 2, Section 8.III. for a case summary.

[108] *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners)*, [2010] SGHC 270 at [48]-[59].

[109] Yeo Tiong Min, *Ch. 06 The Conflict of Laws*, online: SingaporeLaw.sg <http://www.singaporelaw.sg/sglaw/> at para 6.2.1 [Yeo, *The Conflict of Laws*].

1) If the parties to the contract have expressly selected a jurisdiction to govern the contract, that will be the subjective proper law, unless the choice was not made in good faith.[110] The exception is narrowly construed. The choice of an unconnected governing law is not in itself objectionable.
2) If parties have not made any express selection, the court may infer a choice from the contract and the surrounding circumstances at the time of making the contract.
3) If the court cannot find any choice by the parties under 1) and 2), then the proper law is the law of the country or system of law with the closest and most real connection with the transaction and parties—the objective proper law.[111]

2.153. The proper law at 3) above is found by the usual analysis of objective facts in the common law approach in determining the objective intention of the contracting parties. The parties' subjective intent is irrelevant.

i. Enforcing a choice of court agreement

2.154. The contract may include a choice of court clause which provides the basis for service within Singapore's jurisdiction. A choice of court agreement can serve two distinct functions, either as a non-exclusive or exclusive jurisdiction agreement.

1) Non-exclusive jurisdiction agreement.

2.155. Parties may have agreed to submit to the jurisdiction of the Singapore courts. If the non-exclusive jurisdiction clause stipulates another jurisdiction, the nature of the agreement does not prevent action from being commenced in Singapore.[112]

2) Exclusive jurisdiction agreement.

2.156. Where there is a valid exclusive choice of court clause in the contract, the starting point is that the court will give effect to the clause as a matter of enforcing the contract.[113]

2.157. If Singapore is the stipulated jurisdiction, the employer or agent has to show strong cause why they should be allowed to breach the contract and prevent the commencement of proceedings in Singapore. Conversely, where Singapore is not the stipulated jurisdiction the client must show strong cause as to why they should be allowed to carry on their action in breach of contract.[114]

2.158. Where the employer or agent has agreed that the Singapore court has jurisdiction to hear the dispute, the Singapore court has jurisdiction on the basis

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[110] *Peh Teck Quee v Bayerische Landesbank Girozentrale*, [2000] 1 SLR 148; [1999] SGCA 79 [*Peh*].

[111] Yeo, *The Conflict of Laws*, *supra* note 109 at para 6.3.8.

[112] *Ibid*, at para 6.2.13.

[113] *Halsbury's Laws of Singapore*, Volume 6(2), (Singapore: LexisNexis, 2014) at para 75.119.

[114] Yeo, *The Conflict of Laws*, *supra* note 109 at para 6.2.13.

that the parties have agreed to submit to the jurisdiction of the Singapore court.[115]

2.159. Upon establishing local jurisdiction of the court, the client can proceed to bring a claim under the contract. This process will differ depending on the nature of the relationship the client has with the other party to the contract. If the contract was signed with the employer, the client may wish to bring an action for contractual debt. If the contract was signed with an employment agency, damages for breach of warranty may be sought instead.

E. Enforcing the employment contract of a worker who does not have a valid work pass

2.160. A contract that violates EFMA will be an illegal contract that will generally be treated as void and unenforceable under the doctrine of illegality.[116] Once a contract is ascertained by the court to have been either expressly or impliedly prohibited by statute, no recover whatsoever is permitted, regardless of the culpability of the parties to the contract.[117] The protection of minimum entitlements under the EA is also unlikely to apply if the contract is illegal.[118]

2.161. The client may be tricked into entering an illegal contract, where the employer commits work pass fraud or illegally deploys them to work for another company or at another job site.

2.162. A common scenario involves an employer continuing to employ the foreign worker even after their work permit has been revoked. Employment of a foreign worker without a valid work permit is an offence under EFMA[119].

2.163. Another form of illegality is commonly known as a false salary declaration scam. Under this scam, an employer applies for an S Pass for a worker rather than a more appropriate work permit. An S Pass requires a higher minimum salary than a work permit, and an employer may falsely declare a salary that meets this threshold, then deduct a portion of the employee's salary each month. Furnishing false information is an offence under EFMA.[120] Clients will fall under this category, especially if their employers have already been found guilty of false salary declaration.

2.164. Employers may take advantage of such situations to claim illegality as a defence against a client's claim for payment.

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[115] *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing), s 16(1)(b) [*SJCA*]and *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), 0 10 r 3 [*RC*] if a method of service is provided under the contract, and *SJCA*, s 16(1)(a)(ii) and RC o 11 r1(d)(iv) if no method of service is provided for in the contract.

[116] *Asiawerks Global Investment Group Pte Ltd v Ismail Bin Syed Ahmad*, [2004] 1 SLR 234 at para 45. See Chapter 2, Section 8. IV. for a case summary.

[117] Phang and Goh, *Contract Law in Singapore*, supra at para 854, citing *Sinnathamby Rajespathy v Lim Chong Seng* [2002] 2 SLR(R) 608.

[118] Chandran*, Annotated EA* supra note 6 at 29.

[119] *EFMA*, *supra* note 5, s 5(1).

[120] *Ibid*, s 22(1)(d).

2.165. However, the High Court in a criminal case ordered the employer financial compensation to a foreign domestic worker for time worked without a valid work permit. At the time, she was not aware of the revocation of her work permit, and hence innocent of any wrongdoing.[121]

2.166. This court's decision suggests that the innocence of the client may be a determining factor of the enforceability of the contract in civil courts.[122] While yet untested, it could be argued that the employment contract under which the worker is illegally deployed or where false salary is declared is not in itself illegal. Instead, the contracts have been rendered illegal by being performed in an illegal way, or with an illegal purpose. In common law, if the contract itself is not prohibited by statute, an innocent party who did not know or consent to the illegality may still be able to recover under the contract.

2.167. Three principles thus apply to contract illegality:[123]

1) If the contract is prohibited by statute, expressly or impliedly, or contrary to public policy, the contract is void.
2) If, at the time of contracting, there is an intention to perform unlawfully, the contract is unenforceable by those who have that intention.
3) A claimant cannot recover under a contract if, to prove their claim, they have to rely on their own illegal conduct - irrespective of their innocence or ignorance.

2.168. These principles may make it more difficult for a client without a valid work permit to make a claim. The contract could be characterised as an employment contract for an unlicensed foreign worker, which would render the contract illegal in formation. Furthermore, the client would have to rely on their illegal conduct (i.e. working without a valid work pass) in bringing their claim.

2.169. Detailed below are two alternative claims that can be brought by a client, without having to rely upon the illegal contract. These are breach of a collateral contract, or that there should be restitution of benefits that unjustly enriched the employer.

i. Claiming damages for breach of a collateral contract

2.170. Employers who fail to obtain a valid work permit for the client have breached their promise (whether expressly stated or implied) to procure the correct work permit for their employee. This promise amounts to a collateral contract. The client entered into the employment contract with the employer on the reliance that the latter had obtained (or would obtain) the appropriate work permit. As this promise was broken, the client can bring a claim to recover damages, usually for expenses incurred in making themselves available for work. These expenses may include: agent fees, transportation fees, training fees, and any other fees paid to their employer or MOM.

2.171. Employees who are misled into working without a valid work pass and thus commit an offence under EFMA may attempt to obtain damages. They must

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[121] *Public Prosecutor v Donohue Enilia*, [2005] 1 SLR 220. See Chapter 2, Section 8. VIII. for a case summary.

[122] Chandran, *Annotated EA supra* note 6 at 29.

[123] *Archbolds (Freightage) Ltd v Spanglett Ltd*, [1961] QBD 374. See Chapter 2, Section 8. VIII. for a case summary.

prove fraud, or breach of warranty by the employer and the employee must not be guilty of culpable negligence in either entering into the contract or working pursuant to its terms.[124] Additionally, if at some point the client became aware of the illegality and continued to work nonetheless, they may be barred from claiming damages.

ii. Seeking restitution of benefits that unjustly enriched the employer

2.172. Finally, an employee may seek restitution of the benefits they have conferred on the employer under the contract. In other words, if the employer benefited by the employee's work, then the employee may claim the value of those benefits. The burden of proof is on the employee to show that the employer was unjustly enriched at their expense. Damages awarded will be a reasonable sum for services rendered, i.e. *quantum meruit*.

Elements

2.173. Two conditions exist for a restitution claim to succeed:

1) The client's fault must be less than that of the employer;[125] and
2) The client must have rejected the illegal contract in a timely manner.[126]

2.174. Recognised situations in which the client will be seen as less culpable in the illegal act are where they:

1) Were pressured to enter into the contract;
2) Were unaware of the illegality because of mistake or misrepresentation; or
3) Belonged to a class of people the statute seeks to protect.[127]

2.175. The client must reject the contract before the illegal purpose or performance was substantially achieved. The rejection must be voluntary.

F. Addressing vague and conflicting terms—Identifying enforceable terms of a contract

2.176. Employment contracts for migrant workers can often include unclear or contradictory terms. Also, not all contract terms may be legal, and may in fact conflict with provisions of the EA. Two rules may help identify the enforceable terms in such a situation: 1) terms that are less favourable than the EA are illegal; and 2) terms should be interpreted against the drafter of the contract.

i. Rendering a term illegal where it is less favourable than the EA

2.177. Where an employee is covered by the EA, every term of a contract of service that is less favourable to that employee than the relevant terms prescribed by the EA is illegal, null, and void, at least to the extent that it is less favourable.[128]

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[124] *Strongman (1945) Ltd v Sincock*, [1955] 2 QB 525. See Chapter 2, Section 8. VIII. for a case summary.

[125] *Mohamed v Alaga*, [2000] 1 WLR 1815. See Chapter 2, Section 8. VIII. for a case summary.

[126] *Tribe v Tribe*, [1996] Ch 107 (UKCA).

[127] *Kirriri Cotton Co Ltd v Dewani*, [1960] AC 192 (Uganda PC).

2.178. Where multiple terms cover the same area of work, any term less favourable than conditions stipulated under the EA will not be enforceable, and the more favourable term will be considered enforceable instead. For terms that can be interpreted in several ways, only interpretations that conform to the EA's minimum standards will be enforceable. The worker can then claim for damages based on a breach of that term.[129]

2.179. Where all terms, or all possible interpretations of a term, are less favourable than the EA, the condition prescribed in the EA will become the enforceable term.[130]

ii. **Interpreting terms against the drafter of the contract**

2.180. Where there are two reasonable interpretations of a contractual term, the court will adopt interpretations less favourable to the drafter of the contract. Although employers do not always directly draft their own contracts, they are the ones that provide the employment contract, and so are likely to be treated as the drafter.

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[128] *EA*, *supra* note 4, s 8.

[129] *Monteverde Darvin Cynthia v VGO Corp Ltd*, [2014] 2 SLR 1; [2013] SGHC 280 [*Monteverde*] at [12]. See Chapter 2, Section 8. IV. for a case summary.

[130] *Ibid*.

3. ILLEGAL PAYMENTS AND DEDUCTIONS

I. Overview

3.1. Also known as "kickbacks," illegal payments and deductions refers to sums of money passed from the migrant worker to the employer or to local employment agencies which are not authorised by the EA or EFMA.

3.2. These deductions can come in several forms as detailed in Section 3.II. below.

3.3. Many workers do not realise that certain deductions made from their salary are illegal and thus may not realise the need to document or even mention deductions taken from their salary. Hence, it is important to ask clients the right questions in order to uncover illegal deductions that may have been made. Such questions include:

- Did your boss deduct 'savings/ deposit money' from your pay each month, which they promised would be returned upon termination of your work permit?
- Did your boss deduct 'renewal money' from your pay for the renewal of your work permit?

3.4. Proving that illegal deductions have been made from the salary of the client by the employer may be particularly difficult. There is often no paper trail for such payments. See Section 3.II. below for examples of tactics employers use to mask evidence of illegal deductions. There are also employers who receive kickbacks by deducting wages and re-labelling them as authorised deductions from salaries.[131]

3.5. There may also be difficulty in establishing evidence of excessive placement fees paid to local employment agencies.[132] It is a common practice for employment agencies not to give out receipts to workers for payments made. Workers' request for a receipt or contract are routinely denied. Employment agencies may also threaten that workers will not be offered a job if they insist upon having their transactions documented. Even where a receipt is issued, there may be no form of identification such as the name of the agency or the person issuing the receipt to show that the receipt was issued by the employment agency.[133]

A. Unauthorised deductions by employers

3.6. The employer is not allowed to make any deduction other than those permitted by the EA. The following salary deductions are authorised under the EA:

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[131] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 2 at 23.

[132] In 2009 H.O.M.E. saw a total of 23 Chinese workers who had paid money to local agents in Singapore but were unable to reclaim these funds because they did not have any evidence in the form of receipts or contracts, *ibid* at 26.

[133] *Ibid*.

1) For absence from work;
2) For damage to or loss of goods or money expressly entrusted to the employee, where the damage or loss is directly attributable to his negligence or default. The amount to be deducted cannot exceed 25% of one month's salary and the deduction can only be made after establishing that the loss or damage is due to the employee's negligence or default;
3) For actual cost of meals supplied by the employer at the employee's request;
4) For house accommodation or amenities and services supplied by the employer and which the employee has accepted. The amount deducted for house accommodation, amenities and services cannot exceed 25% of one month's salary;
5) For recovery of advances, loans or adjustment of overpayments of salary. The amount deducted should not exceed 25% of one month's salary in the case of deductions for advances and loans;
6) For contributions to superannuation scheme or provident fund or any other scheme at the request of the employee in writing. However, these schemes must be lawfully established for the benefit of the employee and approved by the Commissioner for Labour; and
7) For payments to any registered co-operative society with the written consent of the employee.[134]

3.7. The maximum amount of deductions in respect of any one salary period is 50% of the employee's salary but this does not include deductions made for:

1) Absence from work;
2) Recovery of advances/loans; and
3) Payments with the consent of the employee, to registered co-operative society in respect of subscriptions, entrance fees, instalment of loans, interest and other dues payable.[135]

3.8. It is also an offence under EMA for an employer to receive payments from workers as consideration for their employment[136] or recover employment-related expenses such as the foreign worker levy that the employer is supposed to bear.[137]

B. Unauthorised deductions by employment agents

3.9. Agency fees paid to agents in excess of the limits in the Employment Agencies Act (EAA)[138] are also a form of illegal payment.

3.10. Under EAA, placement fees cannot exceed one month's salary for each year of:

1) The period of validity of the client's work pass; or
2) The period of the contract of employment, whichever is shorter. [139]

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[134] *EA*, *supra* note 4, s 27; TAFEP *Guide*, *supra* note 32.

[135] *Ibid*, s 32(1).

[136] *EFMA*, *supra* note 5, at s 22A. See Chapter 2, Section 8. VI. for the text of the law.

[137] *Ibid*, at s 25(4)(a) and (b).

[138] *Employment Agencies Act* (Cap 92, 2012 Rev Ed Sing).

3.11. Placement fees are capped at a maximum of 2 months' salary.[140]

II. Common examples of illegal deductions

3.12. Three common types of illegal deductions are illustrated in the examples below: 1) deductions of deposit money; 2) deductions for renewal of the work permit; and 3) deductions for accommodation. This is a non-exhaustive list, and illegal deductions can come in many other forms, such as deductions for the damage of tools beyond the actual costs of the items.

3.13. The fourth example demonstrates some of the tactics that employers may use to mask illegal deductions that are made from the salary of the client.

1) 'Savings' or deposit money

3.14. The worker's employer deducts $X from their salary at the end of every month, explaining that they are helping the worker to save up a sum which they will receive when they return to their home country. The worker sees the employer returning other workers' 'savings' money before they leave Singapore, and trusts the employer. However, the worker gets into a dispute with their employer and their employment is terminated by the employer. The employer then claims that the workers' savings money will be forfeited because they have breached the contract.

2) Renewal money

3.15. The worker's work permit is reaching its expiry date. The worker's employer tells them that they have to pay $X if they wish to renew their work permit. The worker agrees, and $X is deducted from their salary over three months.

3) Accommodation

3.16. The worker's IPA indicates that no deductions from their salary will be made for accommodation. However, $X is deducted from their salary every month, which the employer informs them is for the rent of their dormitory room.

4) Deduction not documented

3.17. The worker's employer pays them in cash. $X is deducted from their salary each month. When the worker receives their salary, they sign a payslip on which the employer has recorded that they have received the sum before deductions.

3.18. Alternately, the worker's salary is paid through bank transfer. $X is deducted from their salary each month. After the worker receives their salary, the employer accompanies them to an ATM where they withdraw $X to return to the employer.

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[139] *Employment Agencies Rules*, *supra* note 20.

[140] *Ibid*.

III. Remedies and rules

A. Claiming for unauthorised deductions from client's pay

3.19. Clients may wish to claim unauthorised deductions or illegal payments either from their employers or employment agencies.

i. Bringing an action for debt on the basis that terms less favourable than those provided by the Employment Act (EA) are illegal and void

3.20. No deductions other than those authorised under the provisions of the EA are legal.[141] Terms that allow employers to make unauthorised deductions will be rendered illegal and void.[142] The sums deducted under such terms are thus contractually due to the client.

Elements

3.21. The client must first prove the term of contract which stipulates the illegal payment or deduction of such monies. This can be done by producing a written contract. Where such requirements are not documented, proof of a consistent course of conduct in making such deductions or payments may be evidence of an oral agreement.

3.22. Whether there is a written contract, or in order to prove that an oral agreement was reached, the client must show that such deductions have been made from their salary. Evidence that can be collected to support such a claim include itemised payslips and bank records showing consistent withdrawal of certain sums each month, which would suggest an employer forcing the client to return part of his salary.

3.23. Once the client can prove these deductions, it will be presumed that the sum was collected as consideration for employment, i.e. employment kickbacks. The burden is then on the employer to rebut the presumption by showing that there were legal purposes for deducting or collecting monies from the client.[143]

ii. Seeking refund for excessive fees charged by employment agencies

3.24. Workers may lodge a complaint at the Small Claims Tribunal (SCT) to seek a refund for their agency fee. See Chapter 3, Section 3.IV.C for the process of lodging a claim at the SCT.

3.25. Workers should retain receipts and contracts from the employment agency. There should be some form of identification to show that the receipt was issued

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[141] *EA*, *supra* note 4, s 26.

[142] *Ibid*, s 8.

[143] *EFMA*, *supra* note 5, s 22A.

by that particular agency, such as the name of the agency or the name of the person who issued the receipt.[144]

Evaluation

3.26. Workers may find it difficult to legalise their stay while pursuing a claim at the SCT as MOM does not issue Special Passes[145] to workers with claims against agents for fees paid to them. The SCT adjudication process may take a month or more.[146]

[144] See generally H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 2 at 26.

[145] *Ibid*.

[146] *Ibid*.

4. NON-SALARY EMPLOYMENT AGREEMENT PROBLEMS

I. Overview

4.1. This section covers two main categories of non-salary employment agreement problems: breach of non-salary employment conditions and promises of non-existent jobs by employers or employment agents.

A. Non-salary employment conditions

4.2. Employers are required by law to bear the costs of upkeep and maintenance of foreign workers whom they hire. "Upkeep" and "maintenance"[147] are not defined under Singaporean law, but includes provision of adequate food and medical treatment. The employer is also required to ensure that the foreign worker has "acceptable accommodation".[148] This obligation spans the time before, during, and after employment, for as long as the worker remains in Singapore.

4.3. In reality, most employers will only provide subsidised accommodation and food when these expenses can be deducted from a worker's monthly salary, as these are considered authorised deductions under the EA. However, a worker who is waiting for a work injury claim or a resolution for salary arrears is prohibited from working, and many are forced to find their own shelter and food.[149]

B. Non-existent jobs

4.4. Some employers set up shell or partial-sham businesses to lure foreign workers to Singapore with false employment promises. After collecting large sums of money from these workers, they do not apply for the appropriate work passes and leave the workers to find their own work in Singapore and fend for themselves.

II. Remedies and rules

A. Enforcing implied terms governing non-salary employment conditions

i. Bring a claim for breach of contractual terms implied by statute

4.5. It is yet untested whether EFMA provisions provide a civil right of action. EFMA provisions could theoretically be treated as statutorily implied terms to an employment contract, giving rise to a cause of action in breach of contract when contravened.

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[147] See e.g. *The Employment of Foreign Manpower (Work Passes) Regulations 2012* (S 569/2012 Sing), Fourth Schedule Part I para 1, Fourth Schedule Part II para 1.

[148] See e.g. *ibid* Fourth Schedule Part I para 4, Fourth Schedule Part III para 2.

[149] See generally H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 2 at 30.

4.6. Post-employment, an employer continues to be responsible for the upkeep and maintenance costs of any foreign worker remaining in Singapore who is awaiting resolution and payment of statutory claims for salary arrears under the EA, or work injury compensation under WICA. The employer must also ensure that the worker has acceptable accommodation.

4.7. Thus, where the employer has breached any of these conditions, it is arguable that the client could claim from the employer all expenses in respect to upkeep, maintenance and housing up until repatriation after resolution of the EA or the WICA claim. Note that at the time of publication, this legal argument has not been attempted in this context in Singaporean courts. Thus, strategic litigation will be necessary to establish whether this is a viable line of argument.

B. Seeking damages for expenditure made in reliance of false promises of jobs

i. Bringing a claim for misrepresentation by the employer or employment agent

4.8. See Section 2.III.B.ii. on claims for misrepresentation.

4.9. The false representation in these cases is that a job in Singapore exists for the client. This representation must have been made, either by the employer or agent, in the worker's home country, inducing them to enter into the employment contract and job placement contract. Claimable losses thus include: agent fees, training fees, transportation fees, and any sums paid to the employer or MOM.

4.10. A possible complication may arise if the client has opted to seek employment with another company after learning that the promised job does not exist. A common scenario is that the employer agrees to keep the worker's work permit live in exchange for the worker finding employment with another company. As work permits are tied to a single employer, this practice is illegal, both for the worker and employer.

5. WORK PLACE INJURY

I. Overview

5.1. Apart from salary and contractual problems, workplace injury compensation claims are another common legal problem foreign workers face. Employers can refuse to recognise the injury as having occurred in the workplace or refuse to pay medical costs and other compensation associated with the injury.

5.2. There are two main ways an injured worker can pursue a claim for workplace injury:

1) Statute- the Workplace Injury Compensation Act (WICA)
2) Common law (Tort of negligence)

5.3. The employee must choose one of these routes and can only obtain compensation from one route. The general differences are listed below.

II. Differences between a WICA claim and a claim under common law (tort of negligence)

A. Time bars

5.4. The employee has **one year** from the date of the accident to bring a claim under WICA while he has **six years** to bring a claim under common law. If an employee initially brings a claim under common law, the employee can change to WICA but only if it is within the one year time limit.

B. Amount of possible award

5.5. The amount of any award of compensation may be greater if the employee pursues a common law claim, than if the employee pursues a WICA claim. This is because WICA specifies compensation caps for injuries, meaning that an award cannot go above a certain amount.

C. Difference in evidentiary requirements

5.6. For filing of damages under common law, the employee will have to show that:

1) The employer failed to provide a safe place of work;
2) The employer breached a duty required by law; or
3) The injury was caused by his employer's negligence.

5.7. On the other hand, compensation is payable on a no-fault basis under WICA. As long as an employee suffers an injury that arises out of and in the course of his or her employment, the employee is able to claim work injury compensation. There is no need to prove that the employer was negligent or that sufficient measures were not taken to prevent the accident. As long as the employee was not at fault (e.g. for being an aggressor in a fight), the employee can claim compensation.

D. Need for counsel

5.8. There is no need for the employee to engage a lawyer if he wants to pursue a claim under WICA.

Table 9: Differences between a claim in common law and in WICA

	Common law	**WICA**
Fault	Need to prove that employer/3rd party was at fault	Do not need to prove employer was at fault. Only need to show injury was due to work
Time Bar	Six years	One year
Group of people route available to	Available to all	Migrant workers except foreign domestic workers
Time involved	Court processes slower than WICA	Streamlined process, less time consuming
Amount of compensation	Possibly more- Compensation not capped but amount of damages has to be substantiated before Courts	Possibly less- Compensation based on fixed formula and capped
Need for legal representation	Strongly recommended	Not required
Rules of evidence	Bound by Rules of Evidence	Proceedings not bound by Rules of Evidence. Hearsay may be admitted

III. Workplace Injury Compensation Act (WICA)

5.9. Domestic workers are not covered under WSHA or WICA.[150]

5.10. WICA provides injured employees with a low-cost and relatively speedy alternative to common law to settle compensation claims. There is no need to prove fault or negligence, but in return, the amount of compensation is computed based on a fixed formula[151] and is subject to caps

5.11. Under WICA, all employers are required to purchase injury compensation.[152]

5.12. Every employer must maintain adequate work injury compensation insurance for all employees who are engaged in:

1) Manual work, regardless of salary level, and
2) Non-manual work and earning $1,600 or less a month.

5.13. Failure to do so is an offence punishable by a maximum fine of $10,000 and/or imprisonment of up to 12 months. Maintaining inadequate insurance (e.g. employing ten manual workers but having purchased insurance for only eight workers) is also an offence.[153]

i. What is a workplace injury?

5.14. To claim under WICA, the employee needs only prove that he/she was injured in a work accident or suffered a disease due to their work. Occupational diseases include any diseases that are attributable to chemical and biological agent exposure at work. Situations where an employee is travelling from their workplace in a company vehicle are also covered by WICA.[154]

5.15. The following sections will discuss remedies available under WSHA and WICA.

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[150] WICA, *supra* note 46. See Chapter 2, Section 8.XI. for the text of the law.

[151] Ministry of Manpower, "What can be claimed under WICA?", online: Ministry of Manpower < http://www.mom.gov.sg/workplace-safety-health/work-injury-compensation/Pages/WICA_claimed.aspx> [*MOM What can be claimed?*].

[152] *WICA, supra* note 46, s 23(1). See Chapter 2, Section 8.XI. for the text of the law.

[153] "Work Injury Compensation Act: Frequently Asked Questions" online: Ministry of Manpower" <http://www.mom.gov.sg/legislation/occupational-safety-health/Pages/work-injury-compensation-act-faqs.aspx#insurance> [*MOM Frequently Asked Questions*].

[154] TWC2 News, "Confined to wheelchair for months, worker had no good advice how to make a claim" (8 November 2012), online: Transient Workers Count Too <http://twc2.org.sg>. [TWC2 News, "Confined to wheelchair for months, worker had no good advice how to make a claim"] <http://twc2.org.sg/2012/11/08/confined-to-wheelchair-for-months-worker-had-no-good-advice-how-to-make-a-claim/>.

IV. Remedies and rules

A. Claiming under Work Injury Compensation Act (WICA)

i. Who is eligible to apply for a WICA claim?

5.16. The following groups of people are not covered by the WICA scheme[155]:

1) Uniformed personnel (Singapore Armed Forces, Police, Civil Defence, Central Narcotics Bureau, and Prisons Service);
2) Self-employed persons / independent contractors; and
3) Domestic workers. (emphasis added)

5.17. All other employees can make a claim through WICA. If death results from the injury, the deceased employee's estate or dependents can make a claim.[156]

B. What kinds of injuries are covered under WICA?

5.18. Any kind of injury can be eligible for compensation as long as it occurred in the course of employment.

i. What can be claimed for under WICA?

5.19. In general, the following types of expenses for injury can be claimed: a) medical expenses, including but not limited to medical consultation costs, hospitalisation costs, treatment and surgery, artificial limbs and surgical appliances; b) medical leave wages; and c) a lump sum for permanent incapacity or death.

a) Medical expenses[157]

5.20. These expenses are payable by the employer;

1) Up to specific limits set by law;
2) As long as treatment is considered necessary by Singapore-registered doctors.

[155] *WICA*, *supra* note 46, Fourth Schedule. See Chapter 2, Section 8.XI. for the text of the law.

[156] *WICA*, *supra* note 46, s 6(1). See Chapter 2, Section 8.XI. for the text of the law.

[157] *MOM Frequently Asked Questions, supra* note 151.

Table 10: Limits on medical expenses claim

	Limits	**Accidents occurring before 1 Jun 2012**	**Accidents occurring on and after 1 Jun 2012**
Medical expenses	Maximum	Up to $25,000 or 1 year from date of accident, whichever is reached first	Up to $30,000 or 1 year from date of accident, whichever is reached first

b) Medical leave wages [158]

Table 11: Payable medical leave wages

	MC leave	**Hospitalisation leave**
Full pay	Up to 14 days	Up to 60 days
⅔ pay	15th day onwards, up to one year from accident	61st day onwards, up to one year from accident

[158] *Ibid.* The amount that the worker can claim is based on his Average Monthly Earnings (AME). This is the average earnings over the last 12 months before the accident (including overtime pay, but excluding transport allowance & reimbursement and non-working days e.g. rest day, public holiday).

c) Permanent incapacity (PI)[159]

Table 12: Limits on PI claims

	Limits	Accidents occurring before 1 Jun 2012	Accidents occurring on and after 1 Jun 2012
Permanent incapacity	Minimum	$60,000 multiplied by %PI	$73,000 multiplied by %PI
Permanent incapacity	Maximum	$180,000 multiplied by %PI	$218,000 multiplied by %PI

d) Death[160]

Table 13: Limits on permanent claims for death

	Limits	Accidents that occur before 1 Jun 2012	Accidents that occur on and after 1 Jun 2012
Death	Minimum	$47,000	$57,000
Death	Maximum	$140,000	$170,000

[159] *Ibid.*

[160] *Ibid*.

e) Self-calculation of claimable compensation

Table 14: Calculation of claimable compensation

Compensation payable	[employee's monthly earnings] x [multiplying factor] X [% loss of earning capacity][161]

5.21. For example, if an employee, who was injured on 6 June 2012, has a monthly salary of $800, the multiplying factor (decided by the courts) is 173, and the PI is assessed as 35%, the compensation payable would be $48,440. Since this amount is still within the range of $25,550 and $76,300, it is likely that the employee will be awarded $48,440. If another employee, who was injured on 14 June 2014, has a monthly salary of $400, the multiplying factor is 146, and the PI is assessed as 1%, the compensation payable would be $584. Since this amount does not fall within the range of $730 and $2180, and since it is lesser than the minimum amount of $730, it is likely that the employee will be awarded $730. Similarly, if the calculated amount exceeds the maximum amount, the compensation amount that the employee will get is the maximum amount.

5.22. An additional 25% of the compensation is awarded if the employee suffered permanent total incapacity. Lastly the employee can also claim for medical leave wages that he has not received for the past year.

5.23. An online calculator (WIC Self-Assessment Tool) is available at the official MOM website.[162]

ii. **Evidence required**

5.24. Generally, employees should:

1) Obtain photos/videos, witness testimony to show that it was a workplace injury
2) Keep a photocopy of the Medical Certificate and pass the original to the employer to claim the medical leave wages. The employer is required to pay by the next pay day.[163]
3) Keep photocopies of all medical bills related to the injury and pass originals to the employer, who will pay directly to the clinic / hospital. If the worker has already paid, the employer must reimburse the worker.

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[161] Here, the maximum limit is $218,000 x [% loss of earning capacity]. The minimum limit is $73,000 x [% loss of earning capacity].

[162] http://www.mom.gov.sg Work Injury Compensation Act (WICA) online: Ministry of Manpower <http://www.mom.gov.sg/workplace-safety-health/work-injury-compensation/resources-and-tools/WIC-eCalculators/Pages/default.aspx> [*WICA Calculator*].

[163] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 2 at 30.

C. Claiming at common law under tort of negligence

5.25. Some common problems faced by employees when they first bring a claim under WICA is that they must demonstrate that their injury was a workplace injury. This may be difficult, as the employer may deny that the injury occurred during work. In such instances, the claim may fail if the employee does not produce supporting evidence, such as photos, videos, or co-worker testimony. Additionally, while claims under WICA cannot be brought where the employee caused the accident, such employees may still bring claims in tort at common law.[164]

i. What can be claimed under common law if negligence is successfully proven?

5.26. Damages under common law will include compensation for pain and suffering, loss of wages, medical expenses and any future loss of earnings.

Elements

5.27. The plaintiff must prove that the defendant owed him/her a duty of care. This is done fairly easily with the concepts of non-delegable duty[165] and statutory duties as defined in legislation.[166] The employer owes the employee a non-delegable duty of care (DOC) to ensure the employee's personal safety at the workplace (even when temporarily sent to work on another's ship etc.)[167] A non-delegable DOC can arise from statute as well.[168] However, it is currently unclear whether the breach of duties as defined in WSHA can give rise to a civil right of action. There is no automatic common law DOC if there is a statutory duty but the statutory duty, may give rise to a finding of a common law DOC.[169] It is unclear what the advantages would be of using the common law breach of a statutory DOC. However, possible advantages could include the larger quantum of damages under common law or the longer time bar.

5.28. The plaintiff must prove that the defendant breached the duty by failing to conform to the required standard of conduct.

5.29. The plaintiff must establish the causal link between the workplace accident that led to the injury.

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[164] In such cases, contributory negligence operates as a partial defence to reduce the plaintiff's claim for damages, see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Singapore: Academy Publishing, 2011) at 297. However, the client may still be able to get some form of damages as opposed to WICA where his claim would be barred.

[165] *Chandran a/l Subbiah v Dockers Marine Pte Ltd*, [2010] 1 SLR 786; [2009] SGCA 58 [*Chandran*] at [2]. See Chapter 2, Section 8.XIII. for a case summary.

[166] See e.g. *Workplace Safety and Health Act* (Cap 354A, 2009 Rev Ed Sing) s 12, s 14 [*WSHA*].

[167] *Chandran*, supra note 165.

[168] *Oberoi Imperial Hotel v Tan Kiah Eng*, [1992] 1 SLR 380, [1992] SGCA 1 [*Oberoi*] at [25]-[26].

[169] *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others*, [2014] 2 SLR 360; [2014] SGCA 6 [*Jurong*] at [36]-[37]. See Chapter 2, Section 8.XIII. for a case summary.

5.30. The plaintiff must prove that he/she was indeed harmed.

5.31. The employer has the duty to take reasonable care to provide, among other things, safe working environment and appliances for use by its employees and to maintain them in a proper condition.[170]

Evidence required

5.32. The plaintiff must prove that the defendant breached the duty by failing to conform to the required standard of conduct. This can be done by calling in witnesses, submitting photos and videos of the workplace before and after the accident.

5.33. The plaintiff must establish a causal link between the accident that led to the injury and that they were present at the workplace at the time of the injury. Shift records, payslips, testimony of fellow workers can be used to support this claim.

5.34. The plaintiff has to prove that they were indeed harmed. The plaintiff can use medical records to prove that they were harmed.

Burden of proof

5.35. The employee must prove a *prima facie* case on the balance of probabilities. This means that the employee must first allege the facts that, if true, would make out a claim for negligence. The employer/putative defendant then has the burden to prove that they had taken sufficient precautionary measures. The legal burden remain with the plaintiff but the evidentiary burden shifts to the defendant once the plaintiff has proved negligence on a balance of probabilities.[171]

ii. **Potential use of WSHA to substantiate negligence**

5.36. Although still a legal theory, an employer's breach of WSHA may be relevant in substantiating an employer's negligence. All workplaces except those involving domestic workers are covered under WSHA. Claims are generally not brought under this piece of legislation. Rather, the Act serves as a set of rules and standards that must be adhered to. Failure to follow these provisions can

[170] The case of *Araveanthan and another v Nippon Pigment (S) Pte Ltd,* [1992] SGHC 20 [*Araveanthan*], highlights this duty to take reasonable care. Although the legislation that was referred to in this case was the Factories Act, which is now replaced by WSHA, whether the duties as set out in the WSHA are absolute and whether they give rise to a private right of action is an open question and needs to be litigated. It is also unclear whether the jurisprudence created out the Factories Act are portable to the WSHA. One view would be that since most of the sections of the WSHA are similar to the Factories Act, at least some of the latter's case law could apply to the form. On the other hand, the Factories Act was repealed and replaced with WSHA. If there had been intent to continue the former's jurisprudence, it could be argued that the Factories Act would not have been replaced and instead, but rather amended. See Chapter 2, Section 8.XII. for a case summary.

[171] *Loh Tek Hua v Tey Joo Soon and Another*, [2006] SGDC 225 [*Loh Tek Hua*]. For a case summary see Chapter 2, Section 8.XIII. for a case summary.

contribute to substantiating a claim and go towards supporting an argument that the employer has been negligent where an employee brings a claim under WICA or the common law. When bringing negligence claims against an employer, evidence of breach of WSHA could bolster the claim for negligence.

5.37. Companies and employees covered under WSHA must take reasonably practicable measures to ensure their workplaces are safe. This includes proper risk management or taking steps to identify and manage the existing risks in one's workplace so as to prevent work accidents. Under WSHA, liabilities are specified for a range of people.[172]

[172] *WSHA, supra* note 166. Some of these duties are laid out in Part IV of the WSHA, Part IV. See Chapter 2, Section 8.XII. for the text of the law.

6. PHYSICAL ABUSE AND OTHER NON-WORK INJURIES

I. Overview

6.1. These claims are usually brought by domestic workers against their employers. While most cases of abuse make the employer criminally liable for assault and battery, the victim may also pursue a civil claim to recover damages. The most relevant claim is usually battery because that involves the actual infliction of physical contact/force on the plaintiff's body.

II. Remedies and rules

A. Action for battery

i. Elements

6.2. Battery is defined as an act that is intentionally and directly causes contact with the body of the plaintiff without lawful excuse or justification.[173]

1) Directly causing contact

6.3. Some examples of actions that cause direct contact are slapping, punching and shaking. Other examples include pulling the victim's hair or pouring hot oil over the body.

2) Lawful excuse or justification

6.4. A lawful excuse is a defence that may be raised by the defendant at trial. The onus/burden is on the defendant that even though they were committing a tort, they have a legal reason why they did it, and thus should not be found guilty.

3) Intention

6.5. The client must prove intention on the part of the defendant.[174] In some cases, the defendant must intend the consequences of the interference. Intent can be transferred with battery (i.e. a person swings to hit one person and misses and hits another, he or she is still liable for a battery). Omission can be constituted as the application of force.[175] There is no requirement to show hostility[176], and the requirement still remains to prove intention.

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[173] *Amutha Valli d/o Krishnan v Titular Superior of the Redemptorist Fathers in Singapore and others*, [2009] 2 SLR 1091; [2009] SGHC 35 [*Amutha*] at [71].

[174] *Letang v Cooper*, [1965] QB 232 [*Letang*].

[175] *Fagan v Commissioner of Metropolitan Police*, [1969] 1 QB 439 [*Fagan*].

[176] *Wilson v Pringle*, [1986] 2 All ER 440 [*Wilson*].

6.6. Apart from the above, the plaintiff would have to prove the following:

a) Who is the person that caused the injury?
b) What is the injury that was caused?

4) Aggravating or mitigating factors

6.7. Aggravating factors are any relevant circumstances, supported by the evidence presented during the trial that makes the harshest penalty appropriate. The judge looks at such factors and will contribute towards the amount in compensation as well as the sentencing procedures.

6.8. Some examples include hitting vulnerable parts of the body, abuse of position of power, no remorse for actions and systematic pattern of abuse.[177]

6.9. Mitigating factors are any evidence presented regarding the defendant's character or the circumstances of the crime, which would cause a judge to mete out a lesser sentence.

6.10. Some examples include the age of the defendant at the time of the crime, whether the defendant was an accomplice to the crime and his participation was relatively minor, whether the defendant acted under extreme duress or under the substantial domination of another person.

ii. **Evidence required**

6.11. In order to prove that there was an act that intentionally and directly caused contact with the body of the plaintiff without lawful excuse or justification, the plaintiff can make use of witnesses, medical reports, phone calls, videos, physical marks or bruises. Clinical examinations are also useful in proving that the accused has indeed caused injury to the victim.

[177] *ADF v Public Prosecutor and another appeal*, [2010] 1 SLR 874; [2009] SGCA 57 [78], [85].

7. CONCLUSION

7.1. This chapter summaries common legal problems migrant workers encounter and available legal remedies. There are five common problems identified:

1) Non-payment of salary
2) Illegal payments and deductions
3) Non-salary employment agreement problems
4) Work place injury
5) Physical abuse and other non-work injuries

7.2. It is important to take note of the differences between bringing a claim under common law as opposed to a statutory action. Some of the key differences, like time bars, burden of proof and the evidentiary requirements directly affect the feasibility of some of the actions. While some of the remedies are tried and tested, the others are currently only possible causes of action that require litigation in order to determine whether they are applicable and effective. Most importantly, the practitioner must evaluate the case before him (in terms of evidence etc.) and determine which causes of action are the most feasible.

7.3. Having dealt with the substantive areas of law relating to migrant workers in Chapter 2, Chapter 3 provides an in-depth examination of the procedural law. involved when pursuing causes of action for migrant workers.

8. BLACK LETTER LAW AND CASE LAW ANALYSIS

I. Introduction

8.1. Many references to various statutes and cases were made throughout Chapter 2. Arranged in alphabetical order, this section is a compilation of the relevant portions of the aforementioned statutes as well as the respective case law to better explain the interpretation of the law.

II. Action for contractual debt

	Young v Queensland Trustees Limited **[1956] HCA 51**
Holding	• The debtor must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration. • A debt once proved to have existed, is presumed to continue unless payment, or some other discharge, be either proved, or established by circumstances.

III. Economic duress

	***Huyton SA v Peter Cremer GmbH & Co*,** **[1998] EWHC 1208 (Comm)**
Holding	• "The minimum basic should be the "but for" test: The illegitimate pressure must have […] actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching."

	Tam Tak Chuen v Khairul bin Abdul Rahman and Others **[2009] 2 SLR 240; [2008] SGHC 242**
Holding	• [50]: The four categories of circumstances that indicate when a threat of lawful action that is not unlawful is illegitimate are: o where the threat is an abuse of legal process; o where the demand is not made bona fide; o where the demand is unreasonable; and o where the threat is considered unconscionable in light of all the circumstances. • Although the threat made by the defendant was lawful, he acted with a collateral motive and the presence of that motive made the threat illegitimate. [54]: [Upon discovering the situation that Dr Tam had repeatedly lied to him about his relationship with Ms Chew], "Dr Khairul was perfectly entitled to take all legal steps available to him to terminate the relationship, and to minimise the loss that he himself would suffer from such a termination. He was not however entitled to take advantage of the situation and unfairly profit from it." [55]: "It is material that once Dr Khairul's suspicions had been confirmed, he did not do anything for a period of three months. During that period, he discussed the situation with others and took legal advice. By the time he called Dr Tam and Dr Ashraff to the meeting on 4 March 2007, he had had the transfer documents and the Liability Transfer Agreement prepared and ready for execution. His actions that evening had therefore been very carefully orchestrated." [57]: "On the balance of probabilities, the evidence establishes that not only did Dr Khairul want to end his partnership with the plaintiff but that he also wanted to take over the plaintiff's shares at an undervalue. […] For Dr Khairul to bring the business relationship to an end, it really was not necessary for him to say that unless one of them bought out the other, he would proceed with a compulsory winding up and present the necessary evidence. I am satisfied that in making that threat, although it was a threat of a lawful action, Dr Khairul was acting with a collateral motive and the presence of that motive made the threat illegitimate." • His threat was also illegitimate on the basis that the demands were unreasonable. [58]: "As I have held, the true value of the plaintiff's shares in the J Companies was far more than the $50,000 that Dr Khairul offered Dr Tam for those shares […] As the demands made by Dr Khairul in respect of the consideration for the

	transfer of all the plaintiff's shares in all the companies were unreasonable, his threat was illegitimate on this basis as well."

IV. *Employment Act* (Cap 90, 2009 Rev Ed Sing)

Section 2. Interpretation

(1) In this Act, unless the context otherwise requires —

"**basic rate of pay**" means the total amount of money (including wage adjustments and increments) to which an employee is entitled under his contract of service either for working for a period of time, that is, for one hour, one day, one week, one month or for such other period as may be stated or implied in his contract of service, or for each completed piece or task of work but does not include —

(a) additional payments by way of overtime payments;

(b) additional payments by way of bonus payments or annual wage supplements;

(c) any sum paid to the employee to reimburse him for special expenses incurred by him in the course of his employment;

(d) productivity incentive payments; and

(e) any allowance however described;

"**contract of service**" means any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract or agreement;

	Acme Canning Corporation Ltd v Lee Kim Seng **[1977] 1 MLJ 252**
Holding	• A term of an oral contract of service is an express condition of the contract: "It is clear from the evidence that although there was no written contract of service there was a well-defined and well-understood oral contract of service between the parties, and express condition does not necessarily mean written. It is only in contrast to implied."
Summary of facts	This was an appeal against the decision of the Labour Officer, Butterworth who awarded a sum of $2,865.11 as overtime wages and

	double wages for working on rest days. The respondent was employed as a foreman in the factory and had agreed to work as a monthly rated employee under the terms and conditions which provided no limit in hours in return for such benefits as housing allowance, bonus and incentive payments.

	Carmicheal v National Power Plc **[1999] ICR 1226**
Holding	• Employment contracts may be partly written, partly oral contracts. "Putting the matter at its lowest, I think that it was open to the industrial tribunal to find, as a fact, that the parties did not intend the letters to be the sole record of their agreement but intended that it should be contained partly in the letters, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on. This would not be untypical of agreements by which people are engaged to do work, whether as employees or otherwise." • Where a contract is intended to be partly written, partly oral, oral terms may be implied by subsequent conduct, such as evidence showing mutual understanding of obligations. Memory of the precise conversation is not necessary. "In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief." "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. [...] when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration."

	Melaka Farm Resorts (M) Sdn Bhd v Hong Wei Seng **[2004] 6 MLJ 506**
Holding	• Contracts of service may be formed orally. [13]: "A contract of service may be orally entered into, as in here, where the defendant's executive director testified that the plaintiff's monthly salary was RM2,000." • A contract of service may be implied by the conduct of the parties. [14]: "Further, a contract of service may also be implied by the conduct of the parties, as e.g. in the instant appeal, where the defendant has allowed the plaintiff to work in the defendant's place of employment and a sum of RM4,000 has been paid by the defendant to the plaintiff as salary for two months viz September and October 2001." • The burden of proof is on the employer to prove that the employee's salary has been paid. The employer failed to discharge the burden in failing to produce documentation of payments in the form of payment vouchers, pay slips, cheques etc. [18]: "The burden is on the defendant as the employer to prove this fact. If at all the defendant has paid the arrears of salary, the defendant being a company incorporated under the Companies Act 1965 would certainly have documented the payments in the form of payment vouchers, pay slips, cheques [...] The fact that the defendant has failed to produce the documents evidencing such payments clearly shows on a balance of probabilities that the defendant has failed to discharge the burden of proof."
Summary of facts	The appellant ('the defendant') had orally agreed to employ the respondent ('the plaintiff') as its general manager in absence of a written contract of employment. The plaintiff later resigned and claimed for RM18,000 as arrears for his salary from November 2001 to July 2002, to which the defendant disputed. The director of labour found for the plaintiff but reduced his claim to RM16,000 on the ground that he had worked for only two days in the last month. Dissatisfied, the defendant appealed against the director's decision. The issues before the court were whether an employment contract existed between the parties and whether defendant should pay the arrears in question.

"**domestic worker**" means any house, stable or garden servant or motor car driver, employed in or in connection with the domestic services of any private premises

"**employee**" means a person who has entered into or works under a contract of service with an employer and includes a workman, and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any provision thereof, but does not include —

(a) any seafarer

(b) any domestic worker;

(c) subject to subsection (2), any person employed in a managerial or an executive position; and

(d) any person belonging to any other class of persons whom the Minister may, from time to time by notification in the Gazette, declare not to be employees for the purposes of this Act;

	Asiawerks Global Investment Group Pte Ltd **[2004] 1 SLR(R) 234**
Holding	• The contract of employment for a foreigner without the necessary employment pass will be an illegal contract and cannot be enforced. [45]: "The second defendant could not have been an employee of the plaintiff as that would have been a contravention of the Immigration Act and the Employment of Foreign Workers Act. If a contract of employment did exist, it could not be enforced because it would be an illegal contract. The defence of illegality could be raised notwithstanding the refusal of leave to amend the Defence in the course of trial to include such a defence."
Analysis	Professor Chandran suggests that if the contract rendered illegal by the employee not having the required work permits, the EA is unlikely to be applicable[178]. The logic is likely that applicability of the EA is tied to the validity of the contract. If the contract is rendered void because of an illegality, the EA cannot apply.

[178] *Chandran, Annotated EA*, *supra* note 6 at 29.

"**employer**" means any person who employs another person under a contract of service and includes —

(a) the Government in respect of such categories, classes or descriptions of officers or employees of the Government as from time to time are declared by the President to be employees for the purposes of this Act;

(b) any statutory authority;

(c) the duly authorised agent or manager of the employer; and

(d) the person who owns or is carrying on or for the time being responsible for the management of the profession, business, trade or work in which the employee is engaged;

"**gross rate of pay**" means the total amount of money including allowances to which an employee is entitled under his contract of service either for working for a period of time, that is, for one hour, one day, one week, one month or for such other period as may be stated or implied in his contract of service, or for each completed piece or task of work but does not include —

(a) additional payments by way of overtime payments;

(b) additional payments by way of bonus payments or annual wage supplements;

(c) any sum paid to the employee to reimburse him for special expenses incurred by him in the course of his employment;

(d) productivity incentive payments; and

(e) travelling, food or housing allowances;

"**hours of work**" means the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements exclusive of any intervals allowed for rest and meals;

"**overtime**" means the number of hours worked in any one day or in any one week in excess of the limits specified in Part IV;

"**salary**" means all remuneration including allowances payable to an employee in respect of work done under his contract of service, but does not include —

(a) the value of any house accommodation, supply of electricity, water, medical attendance, or other amenity, or of any service excluded by general or special order of the Minister published in the Gazette;

(b) any contribution paid by the employer on his own account to any pension fund or provident fund;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum paid to the employee to reimburse him for special expenses incurred by him in the course of his employment;

(e) any gratuity payable on discharge or retirement; and

(f) any retrenchment benefit payable on retrenchment;

"**seafarer**" means any person, including the master, who is employed or engaged or works in any capacity on board a ship, but does not include —

(a) a pilot;

(b) a port worker;

(c) a person temporarily employed on the ship during the period it is in port; and

(d) a person who is employed or engaged or works in any capacity on board a harbour craft or pleasure craft licensed under regulations made under section 41 of the Maritime and Port Authority of Singapore Act (Cap. 170A), when the harbour craft or pleasure craft is used within a port declared by the Minister under section 3 of that Act;

"**workman**" means —

(a) any person, skilled or unskilled, who has entered into a contract of service with an employer in pursuance of which he is engaged in manual labour, including any artisan or apprentice, but excluding any seafarer or domestic worker;

(b) any person, other than clerical staff, employed in the operation or maintenance of mechanically propelled vehicles used for the transport of passengers for hire or for commercial purposes;

(c) any person employed partly for manual labour and partly for the purpose of supervising in person any workman in and throughout the performance of his work:

Provided that when any person is employed by any one employer partly as a workman and partly in some other capacity or capacities, that person shall be deemed to be a workman unless it can be established that the time during which that workman has been required to work as a workman in any one salary period as defined in Part III has on no occasion amounted to or exceeded one-half of the total time during which that person has been required to work in such salary period;

(d) any person specified in the First Schedule;

(e) any person whom the Minister may, by notification in the Gazette, declare to be a workman for the purposes of this Act.

(2) Any person who is employed in a managerial or an executive position and is in receipt of a salary not exceeding $4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described), or such other amount as may be prescribed in substitution by the Minister, shall be regarded as an employee for the purposes of this Act except the provisions in Part IV.

Section 8. Illegal terms of service

Every term of a contract of service which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed by this Act shall be illegal, null and void to the extent that it is so less favourable.

	Acme Canning Corporation Ltd v Lee Kim Seng **[1977] 1 MLJ 252**
Holding	• Where an employee agrees to accept other benefits under a scheme of service in lieu of overtime pay, the doctrine of election applies to bar them from claiming for overtime pay later. "According to respondent`s own evidence he agreed to work as a monthly-rated employee under the terms and conditions which included without limit in hours in return for such benefits as housing allowance, food allowance, bonus and incentive payments. Having agreed to accept these benefits under a scheme of service instead of overtime benefits which he would have received otherwise, he cannot now come to court and complain that he is entitled to receive overtime benefits. This is not a case where an employee who by virtue of his inability to obtain other employment or other schemes of service has been forced to work overtime. The type of work which the respondent did, according to his own evidence, involved long periods of standing by doing nothing, i.e. , the actual work he had to do was of much shorter period than 8 hours. It was the nature of the work which persuaded him to continue under the terms and conditions of his service. He himself has said that he made no protest, no complaint, nor did he want to alter his terms of service."
Analysis	Professor Chandran suggests that s8 may be subject to the doctrine of election. *Acme* can be reconciled with *Monteverde* in that following *Monteverde* it is still possible for employees to come to an arrangement where they elect to be paid a higher fixed monthly salary in lieu of overtime salary, merely that there cannot be a contractual obligation to work more than 44 hours per week. Monteverde is also distinguishable from Acme Canning in that it is not clear that she was offered higher salary as a benefit in lieu of overtime payment, whereas in Acme Canning he was explicitly offered a choice of working as a monthly-rated employee with other benefits in lieu of overtime salary, or as a hourly-rated employee.

	Monteverde Darvin Cynthia v VGO Corp Ltd **[2013] SGHC 280**

Holding	• [10]: On correct interpretation of the contract, $1900 is the basic rate of pay, excluding any overtime payment.
	  ○ Appellant's contract expressly disclaimed the concept of additional payment for overtime hours worked, stating that the Appellant was "hired for job completion and not for number of hours worked"
	  ○ The contract does not provide for a fixed number of hours to be worked but purportedly imposes an obligation on the part of the Appellant to work a maximum of 60 hours per week. If she had been required to work fewer than 60 hours a week, it would still be obliged to pay her a monthly salary of $1900.
	• [12]: Even if the contract required the Appellant to work a fixed number of 60 hours a week rather than expressing a maximum, finding would remain the same. Such a clause would be rendered illegal, null and void to the extent that it is less so favourable. Thus, that particular clause would be treated as one which only imposed an obligation to work no more than 44 hours a week, but the contractual obligation to pay her a monthly salary of $1900 would remain unchanged, and accordingly constitute her monthly basic rate of pay.

Summary of facts	The Appellant brought a claim against her former employer, the Respondent, for overtime pay during the period of her employment. The Appellant was employed by the Respondent as a senior boutique associate. It was not disputed that her last drawn monthly basic salary was $1,900 and that she worked 60 hours per week. She ceased her employment with the Respondent when her work pass was cancelled. She then lodged a claim with the Commissioner for overtime pay for the period from the date of commencement of her employment to the date of termination of her employment. Commissioner found that as the Appellant had agreed to work 60 hours a week at a monthly basic salary of $1900, it was reasonable to presume that the parties had agreed for the Respondent to pay a single rate for all hours of work, including the hours worked in excess of 44 hours a week. Thus the respondent had to pay an additional 0.5 times the hourly basic rate for the overtime hours. The issue was whether the Commissioner had erred in accepting that payments for the overtime hours were already included in the Appellant's basic salary of $1900 except for the increase of 50% i.e. 1.5 times the hourly basic rate of pay.

Section 20. Fixation of salary period

(1) An employer may fix periods, which for the purpose of this Act shall be called salary periods, in respect of which salary earned shall be payable.

(2) No salary period shall exceed one month.

(3) In the absence of a salary period so fixed, the salary period shall be deemed to be one month.

Section 20A. Computation of salary for incomplete month's work

(1) If a monthly-rated employee has not completed a whole month of service because —

(a) he commenced employment after the first day of the month;
(b) his employment was terminated before the end of the month;
(c) he took leave of absence without pay for one or more days of the month; or
(d) he took leave of absence to perform his national service under the Enlistment Act (Cap. 93),
(e) the salary due to him for that month shall be calculated in accordance with the following formula:

$$\frac{\text{Monthly gross rate of pay}}{\text{Number of days on which the employee is required to work in that month}} \times \text{Number of days the employee actually worked in that month}$$

(2) In calculating the number of days actually worked by an employee in a month under subsection (1), any day on which an employee is required to work for 5 hours or less under his contract of service shall be regarded as half a day.

Section 26. No unauthorised deductions to be made

No deduction shall be made by an employer from the salary of an employee, unless the deduction is authorised by or under any provision of this Act or is required to be made —

(a) by order of a court or other authority competent to make such order;

(b) pursuant to a declaration made by the Comptroller of Income Tax under section 57 of the Income Tax Act (Cap. 134), the Comptroller of Property Tax under section 38 of the Property Tax Act (Cap. 254) or the Comptroller of Goods and Services Tax under section 79 of the Goods and Services Tax Act (Cap. 117A) that the employer is an agent for recovery of income tax, property tax or goods and services tax (as the case may be) payable by the employee; or

(c) pursuant to a direction given by the Comptroller of Income Tax under section 91 of the Income Tax Act. Act.

Section 27. Authorised deductions

(1) The following deductions may be made from the salary of an employee:

(a) deductions for absence from work;

(b) deductions for damage to or loss of goods expressly entrusted to an employee for custody or for loss of money for which an employee is required to account, where the damage or loss is directly attributable to his neglect or default;

(c) deductions for the actual cost of meals supplied by the employer at the request of the employee;

(d) deductions for house accommodation supplied by the employer;

(e) deductions for such amenities and services supplied by the employer as the Commissioner may authorise;

(f) deductions for recovery of advances or loans or for adjustment of over-payments of salary;

(g) *[Deleted by Act 26 of 2013 wef 01/04/2014]*

(h) deductions of contributions payable by an employer on behalf of an employee under and in accordance with the provisions of the Central Provident Fund Act (Cap. 36);

(i) deductions made at the request of the employee for the purpose of a superannuation scheme or provident fund or any other scheme which is lawfully established for the benefit of the employee and is approved by the Commissioner;

(j) deductions made with the written consent of the employee and paid by the employer to any cooperative society registered under any written law for the time being in force in respect of subscriptions, entrance fees, instalments of loans, interest and other dues payable by the employee to such society; and

(k) any other deductions which may be approved from time to time by the Minister.

(2) For the purposes of subsection (1)(e), “services” does not include the supply of tools and raw materials required for the purposes of employment.

Section 29. Deductions for damages or loss

(1) A deduction under section 27(1)(b) shall not exceed the amount of the damages or loss caused to the employer by the neglect or default of the employee and except with the permission of the Commissioner shall in no case exceed one-quarter (or such other proportion prescribed in substitution by the Minister) of one month’s wages and shall not be made until the employee has been given an opportunity of showing cause against the deduction.

Section 30. Deductions for accommodation, amenity and service

(1) A deduction under section 27(1)(d) or (e) shall not be made from the salary of an employee unless the house accommodation, amenity or service has been accepted by him, as a term of employment or otherwise.

(2) Any deduction under section 27(1)(d) or (e) shall not exceed an amount equivalent to the value of the house accommodation, amenity or service supplied, and the total amount of all deductions under section 27(1)(d) and (e) made from the salary of the employee by his employer in any one salary period shall in no case exceed one-quarter (or such other proportion prescribed in substitution by the Minister) of the salary payable to the employee in respect of that period.

(3) In the case of a deduction under section 27(1)(e), the deduction shall be subject to such conditions as the Commissioner may impose.

Section 32. Deductions not to exceed 50% of salary

(1) The total amount of all deductions made from the salary of an employee by an employer in any one salary period, other than deductions under section 27(1)(a), (f) or (j), shall not exceed 50% (or such other percentage prescribed in substitution by the Minister) of the salary payable to the employee in respect of that period.

(2) Subsection (1) shall not apply to deductions made from the last salary due to an employee on termination of his contract of service or on completion of his contract of service.

Section 35. Application of this Part to certain workmen and other employees

The provisions of this Part shall apply —

(a) to workmen who are in receipt of a salary not exceeding $4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) or such other amount as may be prescribed by the Minister; and

(b) to employees (other than workmen) who are in receipt of a salary not exceeding $2,000 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) or such other amount as may be prescribed by the Minister.

The provisions of this Part shall apply —

(a) to workmen who are in receipt of a salary not exceeding $4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) or such other amount as may be prescribed by the Minister; and

(b) to employees (other than workmen) who are in receipt of a salary not exceeding $2,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) or such other amount as may be prescribed by the Minister.

Section 36. Rest day

(1) Every employee shall be allowed in each week a rest day without pay of one whole day which shall be Sunday or such other day as may be determined from time to time by the employer.

(2) The employer may substitute any continuous period of 30 hours as a rest day for an employee engaged in shift work.

(3) Where in any week a continuous period of 30 hours commencing at any time before 6 p.m. on a Sunday is substituted as a rest day for an employee engaged in shift work, such rest day shall be deemed to have been granted within the week notwithstanding that the period of 30 hours ends after the week.

Section 37. Work on rest day

(1) Subject to section 38(2) or 40(2A), no employee shall be compelled to work on a rest day unless he is engaged in work which by reason of its nature requires to be carried on continuously by a succession of shifts.

(1A) In the event of any dispute, the Commissioner shall have power to decide whether or not an employee is engaged in work which by reason of its nature requires to be carried on continuously by a succession of shifts.

(2) An employee who at his own request works for an employer on a rest day shall be paid for that day —

(a) if the period of work does not exceed half his normal hours of work, a sum at the basic rate of pay for half a day's work;
(b) if the period of work is more than half but does not exceed his normal hours of work, a sum at the basic rate of pay for one day's work; or
(c) if the period of work exceeds his normal hours of work for one day —
    (i) a sum at the basic rate of pay for one day's work; and
    (ii) a sum at the rate of not less than one and a half times his hourly basic rate of pay for each hour or part thereof that the period of work exceeds his normal hours of work for one day.

(3) An employee who at the request of his employer works on a rest day shall be paid for that day —

(a) if the period of work does not exceed half his normal hours of work, a sum at the basic rate of pay for one day's work;
(b) if the period of work is more than half but does not exceed his normal hours of work, a sum at the basic rate of pay for 2 days' work; or
(c) if the period of work exceeds his normal hours of work for one day —
    (i) a sum at the basic rate of pay for 2 days' work; and
    (ii) a sum at the rate of not less than one and a half times his hourly basic rate of pay for each hour or part thereof that the period of work exceeds his normal hours of work for one day.

(3A) In this section —

(a) "normal hours of work" means the number of hours of work (not exceeding the limits applicable to an employee under section 38 or 40, as the case may be) that is agreed between an employer and an employee to be the usual hours of work per day; or in the absence of any such agreement, shall be deemed to be 8 hours a day; and
(b) an employee's "hourly basic rate of pay" is to be calculated in the same manner as for the purpose of calculating payment due to an employee under section 38 for working overtime.

Section 38. Hours of work

(1) Except as hereinafter provided, an employee shall not be required under his contract of service to work —

(a) more than 6 consecutive hours without a period of leisure;
(b) more than 8 hours in one day or more than 44 hours in one week:

Provided that —

(i) an employee who is engaged in work which must be carried on continuously may be required to work for 8 consecutive hours inclusive of a period or periods of not less than 45 minutes in the aggregate during which he shall have the opportunity to have a meal;
(ii) where, by agreement under the contract of service between the employee and the employer, the number of hours of work on one or more days of the week is less than 8, the limit of 8 hours in one day may be exceeded on the remaining days of the week, but so that no employee shall be required to work for more than 9 hours in one day or 44 hours in one week;
(iii) where, by agreement under the contract of service between the employee and the employer, the number of days on which the employee is required to work in a week is not more than 5 days, the limit of 8 hours in one day may be exceeded but so that no employee shall be required to work more than 9 hours in one day or 44 hours in one week; and
(iv) where, by agreement under the contract of service between the employee and the employer, the number of hours of work in every alternate week is less than 44, the limit of 44 hours in one week may be exceeded in the other week, but so that no employee shall be required to work for more than 48 hours in one week or for more than 88 hours in any continuous period of 2 weeks.

(2) An employee may be required by his employer to exceed the limit of hours prescribed in subsection (1) and to work on a rest day, in the case of —

(i) accident, actual or threatened;
(ii) work, the performance of which is essential to the life of the community;
(iii) work essential for defence or security;
(iv) urgent work to be done to machinery or plant;
(v) an interruption of work which it was impossible to foresee; or
(vi) work to be performed by employees in any industrial undertaking essential to the economy of Singapore or any of the essential services as defined under Part III of the Criminal Law (Temporary Provisions) Act (Cap. 67).

(4) If an employee at the request of the employer works —

(a) more than 8 hours in one day except as provided in paragraphs (ii) and (iii) of the proviso to subsection (1), or more than 9 hours in one day in any case specified in those paragraphs; or
(b) more than 44 hours in one week except as provided in paragraph (iv) of the proviso to subsection (1), or more than 48 hours in any one week or more than 88 hours in any continuous period of 2 weeks in any case specified in that paragraph,

he shall be paid for such extra work at the rate of not less than one and a half times his hourly basic rate of pay irrespective of the basis on which his rate of pay is fixed.

(5) An employee shall not be permitted to work overtime for more than 72 hours a month.

(6) For the purpose of calculating under subsection (4) the payment due for overtime to an employee referred to in the first column of the Fourth Schedule, the employee's hourly basic rate of pay shall be determined in accordance with the second column of the Fourth Schedule.

[Act 26 of 2013 wef 01/04/2014]

(8) Except in the circumstances described in subsection (2)(a), (b), (c), (d) and (e), no employee shall under any circumstances work for more than 12 hours in any one day.

Section 40. Shift workers, etc.

(1) Notwithstanding section 38(1), an employee who is engaged under his contract of service in regular shift work or who has otherwise consented in writing to work in accordance with the hours of work specified in this section may be required to work more than 6 consecutive hours, more than 8 hours in any one day or more than 44 hours in any one week but the average number of hours worked over any continuous period of 3 weeks shall not exceed 44 hours per week.

(2) No consent given by an employee under this section shall be valid unless this section and section 38 have been explained to the employee and the employee has been informed of the times at which the hours of work begin and end, the number of working days in each week and the weekly rest day.

(2A) An employee to whom this section applies may be required by his employer to exceed the limit of hours prescribed in subsection (1) and to work on a rest day, in the case of —

(a) accident, actual or threatened;

(b) work, the performance of which is essential to the life of the community;

(c) work essential for defence or security;

(d) urgent work to be done to machinery or plant;

(e) an interruption of work which it was impossible to foresee; or

(f) work to be performed by employees in any industrial undertaking essential to the economy of Singapore or any of the essential services as defined under Part III of the Criminal Law (Temporary Provisions) Act (Cap. 67).

(3) Except in the circumstances described in subsection (2A)(a), (b), (c), (d) and (e), no employee to whom this section applies shall under any circumstances work for more than 12 hours in any one day.

(4) Section 38(4) shall not apply to any employee to whom this section applies, but any such employee who at the request of his employer works more than an average of 44 hours per week over any continuous period of 3 weeks shall be paid for such extra work in accordance with section 38(4).

FOURTH SCHEDULE

EMPLOYEE'S HOURLY BASIC RATE OF PAY

FOR CALCULATION OF PAYMENT DUE FOR OVERTIME

First column	Second column
Type of employee	Calculation of hourly basic rate of pay
1. A workman employed on a monthly rate of pay	$\frac{12 \times \text{Monthly basic rate of pay}}{52 \times 44}$
2. A non-workman whose monthly basic rate of pay is less than $2,250	$\frac{12 \times \text{Monthly basic rate of pay}}{52 \times 44}$
3. A non-workman whose monthly basic rate of pay is $2,250 or more	$\frac{12 \times \$2250}{52 \times 44}$
4. A workman employed on piece rates	The total weekly pay at the basic rate of pay received divided by the total number of hours worked in the week
5. A non-workman employed on piece rates	The total weekly pay at the basic rate of pay received divided by the total number of hours worked in the week, or the hourly basic rate of pay of an employee specified in this column for item 3, whichever is the lower
6. A workman employed on an hourly rate of pay	Actual hourly basic rate of pay
7. A non-workman employed on an hourly rate of pay	Actual hourly basic rate of pay, or the hourly basic rate of pay of an employee specified in this column for item 3, whichever is the lower
8. A workman employed on a daily rate of pay	Daily basic rate of pay divided by the number of working hours per day
9. A non-workman employed on a daily rate of pay	Daily basic rate of pay divided by the number of working hours per day, or the hourly basic rate of pay of an employee specified in this column for item 3, whichever is the lower

V. *Employment Agencies Act* (Cap 92, 2012 Rev Ed Sing)

Employment Agencies Rules 2011

12.—(1) For the purposes of sections 14 and 23(1) of the Act and subject to paragraph (2), the fees that a licensee may charge or receive from an applicant for employment, whether directly or indirectly, for emplacing the applicant for employment with an employer on or after 1st April 2011 shall not exceed —

> (a) where the applicant for employment is a foreign employee, one month's salary for each year of —
>
> > (i) the period of validity of the foreign employee's work pass; or
> >
> > (ii) the period of the contract of employment,

whichever is the shorter, to be pro-rated according to the total relevant period, subject to a maximum of 2 months' salary of the employee;

(2) The reference to fees in paragraph (1) shall not include a reference to any fee charged or received by a licensee in respect of costs incurred by or on behalf of an applicant for employment outside Singapore.

(3) For the purposes of section 14 of the Act, a licensee may charge and receive any form of fees, remuneration, profit or compensation from any applicant for workers or any employer.

(4) The licensee shall, as soon as practicable after receiving any fee, whether directly or indirectly, from an applicant for employment, issue a written receipt for the fee accompanied by an itemised list of components of the fee to the applicant for employment.

VI. *Employment of Foreign Manpower Act* (Cap 91A, 2009 Rev Ed Sing)

Section 22A. Restrictions on receipt, etc., of moneys in connection with employment of foreign employee

(1) No person shall deduct from any salary payable to a foreign employee, or demand or receive, directly or indirectly and whether in Singapore or elsewhere, from a foreign employee any sum or other benefit —

> (a) as consideration or as a condition for the employment of the foreign employee, whether by that person or any other person;
>
> (b) as consideration or as a condition for the continued employment of the foreign employee, whether by that person or any other person; or
>
> (c) as a financial guarantee related, in any way, to the employment of the foreign employee, whether by that person or any other person.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $30,000 or to imprisonment for a term not exceeding 2 years or to both.

(3) Any person who deducts from any salary payable to a foreign employee, or demands or receives, directly or indirectly and whether in Singapore or elsewhere, from a foreign employee any sum or other benefit, not being —

(a) the whole or part of any fee, cost, levy, penalty, charge or amount that the employer of the foreign employee shall bear and be liable to pay under section 25(6);

(b) the whole or part of any fee or deduction prescribed as recoverable from the foreign employee under section 25(6)(a);

(c) where sections 26 to 32 of the Employment Act (Cap. 91) apply to the foreign employee, the whole or part of any deduction from the salary of the foreign employee authorised to be made under those sections;

(d) where sections 26 to 32 of the Employment Act do not apply to the foreign employee, the whole or part of any deduction from the salary of the foreign employee made in accordance with the terms of the employment of the foreign employee; or

(e) the whole or part of any fee, remuneration, profit or compensation that a licensee under the Employment Agencies Act (Cap. 92) may lawfully charge the foreign employee and receive under that Act,

shall be presumed, until the contrary is proved, to have done so as consideration for the employment of the foreign employee.

[Act 24 of 2012 wef 09/11/2012]

VII. Fraudulent misrepresentation

	Derry v Peek **[1889] 14 App Cas 337**
Holding	• "In an action for deceit, […] it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability". • "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice." • "Secondly, fraud is proved when it is [shown] that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states." • "To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief." • "Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." • "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." • There were obviously present reasons which had led the defendants to make the untrue statement, and they "honestly believed what they stated to be a true and fair representation of the facts".
Summary of facts	The defendant were directors of a tramway company who issued prospectus stating that the company had the right to use steam power instead of horses. Under the terms of the relevant Act, the consent of the Board of Trade was required and they had not acquired this right yet. The plaintiff subscribed for shares in the company on the strength of this prospectus.The consent was subsequently refused and the company wound up The plaintiff sued the defendant for deceit.

VIII. Illegality of contract

	Archbolds (Freightage) Ltd v Spanglett Ltd **[1961] QBD 374**
Holding	• 179: "The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at ." • 179-180: "Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal." • 180: "The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."
Summary of facts	"The defendants were furniture manufacturers in London and owned a number of vans with "C" licences under the Road and Rail Traffic Act, 1933, which enabled them to carry their own goods, but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices in London and Leeds, and their vehicles had "A" licences under the Act, which enabled them to carry the goods of others for reward. The plaintiffs' London office, as a result of a telephone conversation with some unidentified person from the defendants' office, believed that the defendants' vehicle had "A" licences, and employed the defendants to carry a part of a load for them on the defendants' van which was taking some of their (the defendants') furniture from London to Leeds. The defendants' driver, having delivered those goods, spoke on the telephone to the traffic manager of the plaintiffs' office at Leeds to see if he could obtain a load for his empty van from Leeds to London, and said that he had just carried goods from the plaintiffs' London office to Leeds. The traffic manager replied that he had a load, which was in fact 200 cases of whisky, but he made no inquiries from the driver as to whether he had an "A" licence. The defendants' van was duly loaded with the whisky, which was stolen on the way to the London docks owing to the driver's negligence. On a claim by the plaintiffs for damages for the loss of the whisky, the defendants pleaded the illegality of the contract, in that their van did not have an "A" licence as required by the Act of 1933."

	Mohamed v Alaga **[2000] 1 WLR 1815**
Holding	• 1824: [Citing *St. John Shipping Corporation v Joseph Rank Ltd* [1957] 1 Q.B. 267 at 283] "The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable." • 1825: "[E]ven if the alleged agreement is discarded as illegal and unenforceable, and without making any reference to that agreement at all, the plaintiff is entitled to be paid a reasonable sum for professional services rendered by him to the defendant on behalf of the defendant's clients, the surrounding circumstances being such as to show that such services were not rendered gratuitously." • 1825: "[T]he plaintiff is not seeking to recover any part of the consideration payable under the unlawful contract, but simply a reasonable reward for professional services rendered. I accept that as an accurate description of what on this limited basis the plaintiff is, in truth, seeking. It is furthermore in my judgment relevant that the parties are not in a situation in which their blameworthiness is equal. The defendant is a solicitors' firm and bound by the rules. It should reasonably be assumed to know what the rules are and to comply with them. If, in truth, it made the agreement as alleged, then it would seem very probable that it acted in knowing disregard of professional rules binding upon it. By contrast the plaintiff, on the assumption made (which I have no difficulty in accepting), was ignorant that there was any reason why the defendant should not make the agreement which he says was made. In other commercial fields, after all, such agreements are common […] On that limited basis I would for my part allow the appeal and reinstate the action to the extent of permitting the plaintiff to pursue a quantum meruit claim for reasonable remuneration for professional services rendered."

Summary of facts	Solicitors contracted with a translator for translation services and introduction of clients to the firm; they would pay translator a share of their fees contrary to legislation. The translator sued for monies owing under the contract; the solicitors claimed the agreement was illegal.

	Strongman (1945) Ltd v Sincock **[1955] 2 QB 525**
Holding	• 526: "The builders could not recover the price under the contract, since the contract was illegal as being absolutely prohibited by the regulations." • 526: "The assurance given by the architect amounted to a warranty or collateral contract that he would obtain the supplementary licences or stop the work if he could not obtain them." • 535: "[T]here was a warranty, or (putting it more accurately) a promise by the architect that he would get supplementary licences, or that if he failed to get them he would stop the work. The builders say the on the faith of that promise they did the work, and as the promise was broken they can recover damages in respect of it." • 526: "That unless the builders had themselves been morally to blame or culpably negligent they might recover damages in a civil action for breach of warranty (and similarly for fraud), since they had been led to commit the criminal offence which was absolutely prohibited by the promise or representation of the architect." • 526: "That these builders had not been culpably negligent in themselves failing to obtain licences or ascertaining that they had been obtained, since, as between architect and builder, the primary obligation to obtain licences was by universal practice admitted to be on the architect, and that duty was not displaced in the present case by the fact that the architect was also the building owner. The builders were accordingly entitled to damages." • 537: "When a builder is doing work for a lay owner - if I may so describe him - the primary obligation is on the builder to see that there is a licence. He ought not simply to rely on the word of the lay owner. He ought to inspect the licence himself. If he does not do so, it is his own fault if he finds himself landed in an illegality. But in this case there was not a lay owner. The owner was the architect, and he himself said in evidence: "I agree that where there is an architect it is the

	universal practice for the architect and not the builder to get the licence." No fault, it seems to me, can, in these circumstances, be attributed to the builder"
Summary of facts	An architect owner contracted with builders to supply materials and carry out work at his premises, and promised orally that he would obtain all the licences necessary at that date under regulation 56A of the Defence (General) Regulations, 1939. Work considerably in excess of the licences granted was carried out. The builders sought a claim for the balance of the price over the licensed amount, or alternatively, damages for a similar amount for breach of the warranty to obtain the licenses.

	PP v Donohue Enilia **[2005] 1 SLR 220**
Holding	• [51] – [53]: There was no basis not to grant compensation for the period where there was no valid work permit as there was no evidence suggesting that the maid had been aware of the revocation of her work permit.
Summary of facts	The respondent was the employer of a foreign maid. The maid's work permit was revoked when the respondent defaulted on the payment of the maid levy, but the respondent continued to engage the services of the maid. Throughout the period of employment, the respondent did not pay the maid any salary. The maid eventually reported the respondent to the police. The respondent pleaded guilty in the magistrate's court to a charge under s 5(1) of the Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed) ("the EFWA") for employing a foreign worker without a valid work permit and to a charge under s 22(1)(a) of the EFWA for failing to comply with the conditions of the work permit to pay the foreign worker a salary. The trial judge, however, refused the Prosecution's application for a compensation order to be made for the unpaid salaries owed by the respondent. The Prosecution appealed against the refusal to grant a compensation order.
Analysis	Professor Chandran suggests that the employee's innocence of the illegality may be a factor in determining the whether the EA can apply

	to the contract. However, it is notable that *Donohue Enilia* is a case about criminal compensation. As mentioned above, the applicability of the EA is likely tied to the enforceability of the contract. Innocence of the employee is thus likely to be relevant as a consideration in common law rules on illegality of contract.

IX. Misrepresentation

	Bisset v Wilkinson **[1927] AC 177 NZ Privy Council**
Holding	• The purchaser unable to set aside contract, because the statement was not a statement of fact, but a statement of opinion which was honestly held which was not actionable. • There was no imbalance in knowledge as both parties were in the same position as they were both aware that the land had never been used for sheep farming. Neither were experts in the trade of farming sheep as well.
Summary of facts	The plaintiff purchased a piece of farm land to use as a sheep farm. He asked the seller of the farm how many sheep the land would hold. The seller had not used it as a sheep farm but estimated that it would carry 2,000 sheep. In reliance of this statement the claimant purchased the land. The estimate turned out to be wrong and the claimant brought an action for misrepresentation, seeking to rescind the contract.

	Deutsche Bank AG v Chang Tse Wen **[2012] SGHC 248**
Holding	• [93]: "For a statement to constitute an actionable misrepresentation, it must be a statement of a present fact. This would exclude statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law." • [93]: [Citing *Bestland Development Pte Ltd v Thasin Development Pte Ltd* [1991] SGHC 27] "A distinction ought to be drawn between a representation of an existing fact and a promise to do something in the future. Furthermore, mere praise by a man of his own goods or undertaking is a matter of puffing and pushing and does not amount to representation. However, a statement of opinion may in certain circumstances involve a statement of fact." • [95]: "However, a finding that the statements in question were statements as to future intention rather than statements of present fact is not necessarily fatal to a misrepresentation claim." • [96]: "Statements as to future facts may therefore be re-characterised as statements implying (i) that the maker of the statement honestly believed that the event would happen in the future; or (ii) that the maker of the statement had reasonable grounds for making such an assertion." • [97]: "The main difficulty in trying to found an action for misrepresentation on statements of future intention is an evidential one. The representee must prove, on a balance of probabilities, the maker's lack of honest belief in the statement."
Summary of facts	The plaintiff sued the defendant for repayment of $1.79m USD outstanding from his private wealth management account. The defendant counterclaimed for damages arising from actionable misrepresentation, fraudulent misrepresentation, breach of duty of care, breach of fiduciary duty, resulting in losses of some $49m USD due to the plaintiff's mismanagement of his private wealth management account.

	Dimmock v Hallett **[1866] 2 Ch App 21**
Holding	• There was a half-truth which amounted to a "misrepresentation calculated materially to mislead a purchaser".
Summary of facts	The defendant was a seller of a farm, and had told the plaintiff, the purchaser, that all farms on the land were fully let. However, he did not inform the plaintiff that the tenants had given notice to quit. The plaintiff bought the land, thinking that tenants would stay. The tenants left, and the plaintiff sued the defendant for misrepresentation.

	Edgington v Fitzmaurice **[1885] 29 Ch D 459**
Holding	• "A misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it." • "Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit."
Summary of facts	"The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The Plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus offered a charge upon the property of the company, and stated in his evidence that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent."

	Holmes v Jones **(1907) 4 CLR 1692**
Holding	• The defendant is not entitled to rely on the original misrepresentation as it did not induce him to enter into the contract. He had relied on his own information gathered from his inspection to enter into the contract. • There is a rebuttable inference of reliance. For this inference to arise, the claimant has to prove that the statement would have induced a reasonable person to enter the contract. • If it can be shown that the claimant relied on his own independently acquired information and not upon the misrepresentation, the element of inducement would be lacking and it would not amount to an operative misrepresentation.
Summary of facts	The plaintiff tried to sell land to the defendant, but had made false representations as to the number of livestock on it. The defendant was informed of the falsity of the statement and refused to enter into the contract, but negotiated another deal on a different basis a few months after inspecting the grounds. The defendant later argued that the original misrepresentation had induced him to enter the contract that was signed a few months later after his inspection.

	Leow Chin Hua v Ng Poh Buan **[2005] SGHC 39**
Holding	• [13]: "Admittedly, a party who has had the opportunity to inspect documents but does not do so is not necessarily deprived of the right to assert that he was deceived by a false representation: see *Redgrave v Hurd* (1881) 20 Ch D 1. However, it is quite clear that if a party conducts his own investigation and does not rely on the misrepresentation, it can no longer be said that the false statement had an effect on him: see *Attwood v Small* (1838) 6 Cl & Fin 232; 7 ER 684."
Summary of facts	The defendant represented to the plaintiff that the business had a turnover of $800,000 and made a profit of $200,000 a year. Before the plaintiff entered into a joint venture with the defendant, the plaintiff checked the accounts and thought it was worth his while to enter into

	a joint venture with the defendant. The plaintiff then invested in the business, which subsequently started to lose money. The plaintiff then claimed that the defendant had misrepresented him and sought to rescind the contract.

	Redgrave v Hurd **[1881] 20 Ch D 1**
Holding	• 2: "[T]hat where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue." • 2: "[I]t is no defence in such an action that the Defendant made a cursory and incomplete inquiry into the facts, for that if a material representation is made to him he must be taken to have entered into the contract on the faith of it, and in order to take away his right to have the contract rescinded if it is untrue, it must be [shown] either that he had knowledge of facts which [showed] it to be untrue, or that he stated in terms, or [showed] clearly by his conduct, that he did not rely on the representation."
Summary of facts	The plaintiff, a solicitor, wanted to sell his business. He told the defendant, a buyer, that his business brought in £300/year, and brought the accounts of his business to D. The defendant only took a cursory look and declined to look further. Had he done so, he would have noticed that the business only brought in £200/year The contract was concluded, but the defendant later found out and refused to perform. The plaintiff sued for specific performance, while the defendant sought to rescind the contract.

	Smith v Land & House Property Corporation **[1884] 28 Ch D 7**
Holding	• Court rejected vendor's argument on the basis that his statement was held to contain an implicit assertion that he knew of no facts which would lead to the conclusion that the

	tenant was actually not a "most desirable tenant". • "In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. Such a statement is, in a sense, a statement of fact about the condition of the man's own mind. Nevertheless, this is an irrelevant fact, for it is of no consequence what the opinion is." • "But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion."
Summary of facts	The plaintiff purchased a hotel The seller described a tenant to be a "most desirable tenant". This was despite the seller's knowledge that the tenant was in arrears and on the verge of bankruptcy, and the rent which he had paid was only paid under the threat of legal action. The plaintiff bought the property and the tenant defaulted on payments. The plaintiff sued the seller for misrepresentation.

	Spice Girls Ltd v Aprilla World Service BV **[2002] EMLR 27**
Holding	• The defendant was liable for misrepresentation by conduct that the group would stay intact. • The representation that no one was going to leave the group was necessarily implicit in the conduct of the Spice Girls. Although AWS had accepted the risk that one of the girls may leave after the contract was concluded, it did not accept the risk that one of them had already decided to leave prior to contract formation.
Summary of facts	The defendant, the Spice Girls, entered into a contract with the plaintiff, in which the plaintiff would sponsor the defendant's concert tour in return for promotional work to be carried out by the defendant. Before the contract was concluded, the members of the Spice Girls all knew that one of them had the intention to leave the group, but nobody informed the plaintiff of this, and went ahead with a photoshoot with all members present, organised just before the contract was concluded. The plaintiff then sued for misrepresentation after the member left (as this would reduce the sponsorship appeal of the Spice Girls with a missing member), claiming that they were induced into entering the

	contract. The defendant claimed that a clause in the contract had already allocated the risk of one of the members leaving the group to AWS.

	Trans-World (Aluminium) Ltd v Cornelder China (Singapore) **[2003] 3 SLR 501**
Holding	• The claim for misrepresentation was dismissed. There is no general duty for full disclosure. • [66], [68], [126] and [130]: "Misrepresentation by silence required more than mere silence. There ought to be a wilful suppression of material and important facts. Thus where silence was alleged to constitute misleading conduct, the proper approach was to assess silence as a circumstance like any other act or statement and in the context in which it occurred." • [132] to [136]: "There was no duty of care owed by the defendants as there was no voluntary assumption of responsibility here. There was no obligation to speak in the context of negotiations for an ordinary commercial contract. While S had chosen to answer questions posed to him, he was not asked nor did he undertake to provide information on title or adverse claims."
Summary of facts	"The plaintiffs entered into a contract with M for the purchase of cargo in China. The cargo was in the custody of the defendant warehousemen and collateral managers. The plaintiffs alleged that the defendants' employee, S, had represented to them that the cargo carried no risk as to title and delivery. However, the cargo was already the subject of an injunction and subsequently, in litigation in the Chinese courts, it was held that M did not have good title to the cargo. The plaintiffs commenced an action against the defendants for misrepresentation, whether fraudulent, innocent or negligent."

	With v O'Flanaghan **[1936] Ch 575**
Holding	• The defendant was under an obligation to disclose this change of circumstances to the plaintiff because (1) there

	was a continuing representation, and (2) the defendant had a duty to communicate the fundamental change of circumstances to the plaintiff.
Summary of facts	The plaintiff purchased a medical practice from the defendant. The plaintiff was induced to buy the practice by the defendant's statement that the practice took £2,000 per annum. This statement was true at the time the negotiations for the sale of the practice began. However, by time the sale was completed the practice was virtually worthless due to the ill-health of the medical practitioner. The defendant had failed to disclose this fact to the plaintiff.

X. Oral promises

	Bannerman v White **[1861] 10 CBNS 844**
Holding	• Where a statement was made close to the transaction it is more likely to be a term. The two day interval between making the statement and forming the contract was sufficiently close to render the statement a term. • The undertaking given by plaintiff was relied upon by the defendant to agree to purchase. It was the term upon which the defendant contracted and would be contrary to the defendant's intention (which was known to plaintiff) should the contract remain valid if sulphur was used.
Summary of facts	The plaintiff agreed by contract to purchase some hops to be used for making beer. He asked the seller if the hops had been treated with sulphur and told him if they had he wouldn't buy them as he would not be able to use them for making beer if they had. The defendant assured him that the hops had not been treated with sulphur. In fact they had been treated with sulphur.

	Birch v Paramount Estates Ltd **[1956] 167 Estates Gazette 396**
Holding	• An oral warranty collateral to the contract was found because parties intended for the contract to be partly written, partly oral.

Analysis	Comparing this case with Oscar Chess, in both cases, the statement as not reduced to writing, but the outcomes were different. The two cases can be distinguished by whether the parties intended for the contract to be partly written, partly oral, or wholly written.

	Dick Bentley Productions v Harold Smith Motors **[1965] 2 All ER 65**
Holding	• The statement was a term, not a representation. • If a representation is made in the course of dealings for a contract for the very purpose of inducing the client to enter into the contract, there is prima facie ground for inferring that the representation was intended as a warranty. • The maker of the representation can rebut this inference if they can show that they were innocent of fault in making it in that it would not be reasonable in the circumstances for them to be bound by it because they were not in a position to find out the truth.
Summary of facts	The defendant told the plaintiff that the car had been fitted with replacement engine and gearbox, and that it had since done only 20,000 miles (the mileage shown on the odometer). The plaintiff bought car, and found it to be unsatisfactory. The trial judge held mileage statement to be untrue though not dishonest, and awarded the plaintiff damages for breach of warranty (taken to mean a binding promise in the ordinary sense). The defendant appealed.

	Kleinwort Benson Ltd v Malaysia Mining Corporation BHD **[1989] 1 WLR 379**
Holding	• The defendant's letter of comfort was simply a representation of fact which did not amount to a contract promise. Hence, they were not legally bound to the letter of comfort.
Summary of facts	The plaintiff agreed to make a £10 million credit facility available to a subsidiary company of the defendant. The defendant refused to act as guarantors, but gave the plaintiff a letter of comfort stating that "it is our policy to ensure that the business of [the subsidiary company] is at all times in a position to meet its liabilities to you under the above

	arrangements". The subsidiary company later ceased to trade after the collapse of the market at a time when its indebtedness to the plaintiff was £10 million. The defendant refused to honour their undertaking in their letter of comfort.

	Oscar Chess Ltd v Williams **[1957] 1 All ER 325**
Holding	• An affirmation without warranty is only a representation; a warranty required to make up a term. • "When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it and he does so, it is easy to infer a warranty." • "If, however, the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty." • "If the seller says: 'I believe the car is a 1948 Morris. Here is the registration book to prove it', there is clearly no warranty. It is a statement of belief, not a contractual promise. If however, the seller says: 'I guarantee that it is a 1948 Morris. This is borne out by the registration book, but you need not rely solely on that. I give you my own guarantee that it is', there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book is wrong."
Summary of facts	The defendant sold the plaintiff a car which was actually a 1939 model. The registration book showed that it was first registered in 1948. The defendant honestly believed the car to be a 1948 model and showed the salesman for the plaintiff the registration book. The salesman also believed it was a 1948. The purchase price of £290 was calculated on this basis. If the plaintiff had known it to be a 1939 model, they would have paid only £175 for it. The plaintiff claimed £115 as damages for breach of warranty. Trial judge held assumption that car was 1948 model was fundamental and gave judgment for the plaintiff. The defendant appealed.

XI. *Work Injury Compensation Act* (Cap 354, 2009 Rev Ed Sing)

Section 6. Persons entitled to compensation

1) Compensation under this Act shall be payable to or for the benefit of the employee or, where death results from the injury, to the deceased employee's estate or to or for the benefit of his dependants as provided by this Act.

(2) Where a dependant dies before a claim under this Act is determined by the Commissioner, the legal personal representative of the dependant shall have no right to payment of compensation, and the amount of compensation shall be calculated and apportioned as if that dependant had died before the employee.

(3) Where a deceased employee has no dependant, the compensation shall be paid into a fund to be known as the Workers' Fund which shall be established, maintained and applied in accordance with regulations made under this Act and the person managing the Fund shall be entitled to claim the compensation.

Section 23. Compulsory insurance against employer's liability

(1) Every employer shall insure and maintain insurance under one or more approved policies with an insurer within the meaning of the Insurance Act (Cap. 142) against all liabilities which he may incur under the provisions of this Act in respect of any employee employed by him unless the Minister, by notification in the Gazette, waives the requirement of such insurance in relation to any employer.

(2) The Minister may, from time to time, prescribe the minimum amounts for which an employer shall insure himself in respect of any of his liabilities under this Act.

(3) For the avoidance of doubt, an employer shall be liable to pay any liability that he may incur under this Act in excess of the insurance limits that the Minister may prescribe under subsection (2).

(4) In this section, "approved policy" means a policy of insurance not subject to any conditions, exclusions or exceptions prohibited by regulations made under this Act.

(5) Any conditions, exclusions or exceptions imposed in a policy of insurance by any insurer which are prohibited by regulations made under this Act shall not absolve the insurer from any liability under the policy which the insurer may incur under the provisions of this Act.

FOURTH SCHEDULE

CLASSES OF PERSONS NOT COVERED

1. Any member of the Singapore Armed Forces.

2. Any officer of the Singapore Police Force, the Singapore Civil Defence Force, the Central Narcotics Bureau or the Singapore Prisons Service.

3. A domestic worker, being any person employed in or in connection with the domestic services of any private premises.

XII. *Workplace Safety and Health Act* (Cap 354A, 2009 Rev Ed Sing)

Section 12. Duties of employers

(1) It shall be the duty of every employer to take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of his employees at work.

(2) It shall be the duty of every employer to take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of persons (not being his employees) who may be affected by any undertaking carried on by him in the workplace.

(3) For the purposes of subsection (1), the measures necessary to ensure the safety and health of persons at work include —

(a) providing and maintaining for those persons a work environment which is safe, without risk to health, and adequate as regards facilities and arrangements for their welfare at work;

(b) ensuring that adequate safety measures are taken in respect of any machinery, equipment, plant, article or process used by those persons;

(c) ensuring that those persons are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use of things —

(i) in their workplace; or

(ii) near their workplace and under the control of the employer;

(d) developing and implementing procedures for dealing with emergencies that may arise while those persons are at work; and

(e) ensuring that those persons at work have adequate instruction, information, training and supervision as is necessary for them to perform their work.

(4) Every employer shall, where required by the regulations, give to persons (not being his employees) the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their safety or health while those persons are at his workplace.

Section 14. Duties of principals

(1) Subject to subsection (2), it shall be the duty of every principal to take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of —

(a) any contractor engaged by the principal when at work;

(b) any direct or indirect subcontractor engaged by such contractor when at work; and

(c) any employee employed by such contractor or subcontractor when at work.

(2) The duty imposed on the principal in subsection (1) shall only apply where the contractor, subcontractor or employee referred to in that subsection is working under the direction of the principal as to the manner in which the work is carried out.

(3) It shall be the duty of every principal to take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of persons (other than a person referred to in subsection (1)(a), (b) or (c) working under the principal's direction) who may be affected by any undertaking carried on by him in the workplace.

(4) For the purposes of subsection (1), the measures necessary to ensure the safety and health of persons at work include —

(a) providing and maintaining for those persons a work environment which is safe, without risk to health, and adequate as regards facilities and arrangements for their welfare at work;

(b) ensuring that adequate safety measures are taken in respect of any machinery, equipment, plant, article or process used by those persons;

(c) ensuring that those persons are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use of things —

(i) in their workplace; or

(ii) near their workplace and under the control of the principal;

(d) developing and implementing procedures for dealing with emergencies that may arise while those persons are at work; and

(e) ensuring that those persons at work have adequate instruction, information, training and supervision as is necessary for them to perform their work.

(5) Every principal shall, where required by the regulations, give to persons (other than a person referred to in subsection (1)(a), (b) or (c) working under the principal's direction) the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their safety or health while those persons are at his workplace.

XIII. Tort

	Chandran a/l Subbiah v Dockers Marine Pte Ltd **[2010] 1 SLR 786**
Holding	• Employer owes employee non-delegable DOC for employee's personal safety at work place (even when temporarily sent to work on someone else's ship etc) • DOC found to be owed, irrespective of who had been careless (important in showing that even if the job was sub-contracted out, the main employer can still be held responsible), • [17]: "A distinctive feature of an employer's duty of care to his employees for their safety is that it is *personal* and therefore *non-delegable.* This means that the employer cannot escape liability simply by baldly asserting that another party was negligent and responsible for the employee's injury."
Summary of facts	"The appellant worked for the respondent as a stevedore. On 18 October 2005, the appellant was instructed by the respondent to move cargo containers on board a vessel, the Tasman Mariner ("the vessel"). Prior to the commencement of work no safety inspection or safety briefing was carried out by the respondent's supervisor; neither

	was any safety equipment supplied to the appellant even though he was required to work from heights. During the course of his engagement on board the vessel, a ladder ("the defective ladder") on which the appellant was standing suddenly detached from the hull of the vessel. This caused the appellant to fall about 10m into a hatch of the vessel. Resulting thereto, he sustained severe injuries. Consequently, the appellant started proceedings to recover damages from the respondent."

	Oberoi Imperial Hotel v Tan Kiah Eng **[1992] 1 SLR 380, [1992] SGCA 1**
Holding	• Employer owed employee non-delegable duty under statute. • [25]: "[W]e were of the view that [the employers] were clearly in breach of their absolute duty under s 22 of [Factories Act (Cap 104, 1985 Rev Ed) which provides: (1) Every dangerous part of any machinery […] shall be securely fenced […]" • [26]: "The removal of …safety feature clearly put the [employers] in breach of their s 22 duty."
Summary of facts	"The respondent Tan was employed by the appellant hotel Oberoi as a laundry operator. Her hand was seriously injured while operating the laundry press which had been altered. Tan sued Oberoi for damages for the injuries suffered, alleging that the injuries were caused by an unsafe system. The alteration to the laundry press was alleged to be in breach of Oberoi's common law duties as employers. Alternatively, Tan alleged that Oberoi breached their statutory duties imposed by the equivalent of the present ss 20 to 22 of the Factories Act (Cap 104) ('the Act'). Oberoi denied Tan's allegations, the appellants and alleged that Tan was contributorily negligent and in breach of her statutory duty under the present ss 80 and 81 of the Act. The defence of *volenti non fit injuria* was also pleaded. The trial judge found Oberoi wholly liable and they appealed, arguing that the trial judge erred in rejecting their argument that Tan was contributorily negligent."

	Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others **[2014] 2 SLR 360; [2014] SGCA 6**[179]
Holding	• [2]: "The parties' operational activities were embraced by the regulatory framework installed by the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") and the relevant regulations (collectively, "the WSH Regime"). In this regard, there was no common law tort of careless performance of a statutory duty. The mere presence of a statutory duty did not automatically give rise to a concomitant common law duty of care. Rather, the presence of a statutory duty would fall within the rubric of the existing analysis for negligence: at [36] and [37]." • [6]: "Industry standards should be taken into account in assessing the standard of care. The industry standard provided by the Singapore Standard SS 536 2008 Code of Practice ("the Code") was applicable here. So were the stipulations under WSHA: at [43]." • The second quotation gives guidance on how to assess standard of care once DOC is established.
Summary of facts	"The appellant, Jurong Primewide Pte Ltd ("JPW") was the main contractor of a development at a worksite. The third respondent, MA Builders Pte Ltd ("MA") had various subcontracts with JPW to carry out structural, architectural and external works on the worksite. The second respondent, Hup Hin Transport Co Pte Ltd ("Hup Hin"), had a rental agreement with JPW to supply cranes to the worksite ("crane supply contract"), and a hiring contract with Moh Seng Cranes Pte. Ltd. ("Moh Seng"), to hire Moh Seng's mobile cranes whenever required. MA made a request to JPW for a mobile crane to lift some steel rebars. In turn JPW requested Hup Hin to deliver a mobile crane to the worksite the next day. As Hup Hin did not have any cranes immediately available for hire, Hup Hin hired one from Moh Seng. The next day, one Lian Lam Hoe ("Lian"), Moh Seng's employee, drove the crane to the worksite. Upon arrival, he was directed by the lifting supervisor employed by MA ("Lifting Supervisor"), to park the crane at a designated location at the worksite. Lian raised concerns that the designated location would be unable to bear the weight of the crane. The Lifting Supervisor assured Lian that the ground comprised of hard flooring which could safely support the crane's weight. Lian continued to harbour concerns and conveyed this to JPW's Safety Officer. After conferring with the Lifting Supervisor, JPW's Safety Officer reassured Lian that the ground was safe. Lian then deployed the crane in

[179] NB: This is not a case where the migrant worker was a plaintiff or defendant.

	accordance with the Lifting Supervisor's instructions. During the lifting operation, part of the crane collapsed into a concealed man-hole, causing the crane to topple over. The High Court judge ("the Judge") held that the Lifting Supervisor was JPW's representative and that JPW was wholly liable in negligence to Moh Seng for the damaged crane. The Judge also held that no contributory negligence was attributable to Moh Seng and MA. Finally, the Judge dismissed JPW's contractual claim for an indemnity against both Hup Hin and MA. As regards the claim against Hup Hin, the Judge held that the legal basis of the relationship between JPW, Hup Hin and Moh Seng was a tripartite oral contract between the parties ("oral contract"). The crane supply contract, which contained an indemnity clause, was not incorporated into the oral contract. JPW's claim against MA for breach of the subcontracts also failed. The Judge construed "wilful default" in the indemnity clause to refer to JPW's failure to take reasonable care. Given his earlier finding of negligence on JPW's part, JPW could not claim an indemnity against MA. JPW appealed against the entirety of the Judge's decision."

	Loh Tek Hua v Tey Joo Soon and Another **[2006] SGDC 225**
Holding	• Claim for damages as a result of injuries arising from a traffic accident. • "It is trite law that the legal burden, or the burden of proving a fact to the requisite standard of proof, always remains with the party who seeks to prove that fact. The evidential burden, or the burden of adducing evidence to meet the standard of proof or to prevent the opposing party from meeting the standard of proof, may be on either party, depending on the circumstances of the case. Jeffrey Pinsler illustrates the point of the shifting of the evidential burden clearly in *Evidence, Advocacy and the Litigation Process* (2nd Edition) at page 240: • [11]: "Unlike the legal burden, the evidential burden can shift throughout the trial. Put another way, the state of the evidence can shift so that at one moment the prosecution's case is strong enough to satisfy the standard of proof (proof beyond a reasonable doubt) and at another, it is not. In the former situation, the evidential burden shifts to the accused in the sense that if he does not adduce evidence to bring the prosecution's case below the standard of proof (ie by creating a reasonable doubt), he would lose. As a matter of practice, the court does not consider the incidence of the evidential burden at different moments in the proceedings. The crucial

	time for this purpose is at the end of the prosecution's case. He must discharge the evidential burden by then in order for the accused to be called upon to enter his defence […] The same principles apply to the facts in issue which need to be proved by a plaintiff and a defendant in civil proceedings." • [12]: "Applying the above principles to the case before me, the legal burden was on the plaintiff to prove negligence on the part of the 1st and/or 2nd defendant, as was pleaded in the statement of claim. The evidential burden would be initially on the plaintiff to establish such negligence on a balance of probabilities. If he achieved this, the burden would shift to the defendant to try at least to equalise the probabilities." • [14]: "In the present case, similarly, there was a *prima facie* case of negligence against both the defendants or either of them, and it was for each defendant to displace it."
Summary of facts	[2]-[4]: "The circumstances surrounding the accident which occurred on 23 September 2003 at about 8:30 pm at the junction of Admiralty Road West and Woodlands Avenue 8 were straightforward. The weather was clear, the roads were dry and the traffic was light. The 1st defendant was riding a motorcycle along Admiralty Road West. The plaintiff was his pillion rider. The 2nd defendant was the owner and driver of a car which was travelling along Admiralty Road West in the opposite direction. At the T-junction of Admiralty Road West and Woodlands Avenue 8, a signal-controlled junction, as the motorcycle was making a right turn into Woodlands Avenue 8, a collision took place between the motorcycle and the car. The car hit the left side of the motorcycle. As a result of the impact, both the plaintiff and the 1stdefendant fell from the motorcycle. According to the 2nd defendant, the plaintiff landed on the roof of his car and fell onto the rear windscreen. The 1st defendant landed on his front windscreen before falling to the ground. In his statement of claim, the plaintiff alleged negligence on the part of the 1st defendant and/or 2nddefendant. The respective defendants blamed each other for the accident. Both claimed to have the right of way when the accident occurred. What was pertinent was that in their pleadings, neither defendant blamed the plaintiff, who was a pillion rider, in any way for the accident. I highlighted this fact as it was a factor I took into account in my findings later in this judgment." *(The facts of how the plaintiff proved the accident are not very relevant and important to migrant worker claims.)*

	Amus bin Pangkong v Jurong Shipyard Ltd and another **[2000] 1 SLR(R) 839; [2000] SGHC 67 [*Amus*]**
Holding	• Held, allowing the appeal. • [7]: "The burden of proving what was reasonably practicable in relation to s 33(3) lay not on the person injured but on the person responsible for maintaining the safety of the workplace."
Summary of facts	"The appellant worker was employed by the second respondents ("the employers") to carry out blastering work in a tank of a vessel at the shipyard of the first respondents ("shipyard owners"). The shipyard owners subcontracted the blastering work to the employers. The worker accidentally fell to the bottom of the tank and when his co-workers discovered him, he was not wearing a safety belt. However, an insurance adjuster for the shipyard owner's insurers recorded a statement where the worker admitted wearing a safety belt. At trial, the worker disputed the contents of the statement and that the signature on it was his. A co-worker testified that there was no safety equipment available on the day of the accident and that any safety equipment had been given long before that day. The worker claimed damages for personal injuries suffered as a result of the negligence of the shipyard owners and/or the employers, a breach of their duties as occupiers of the vessel and a breach of their statutory duties under the Factories Act (Cap 104, 1998 Rev Ed) ("the Act"). The district judge dismissed all the worker's claims. On appeal the worker argued that the district judge erred in: (1) finding that he had on a safety belt consequently erred in concluding that the employers were not in breach of their duty to provide the worker with a safety belt; (2) confining the duty to the commencement of the blastering work as the duty to provide a safe system of work was continuous; (3) finding that the employers' failure to supervise the workers was not the proximate cause of the worker's injuries; (4) finding that the first respondents were not occupiers of the tank in the vessel; (5) finding that the employers were not liable to the worker as occupiers; and (6) concluding that there was no breach of s 33(3) and 33(7) of the Act by either of the respondents. Section 33(3) of the Act provided that there should be safe access and egress from any place or work and s 33(7) provided, among other things, that a secure foothold and handhold be provided for a person who had to work at a height of more than 3 metres."

	Araveanthan and another v Nippon Pigment (S) Pte Ltd **[1992] SGHC 20**
Holding	• The wording of s 24 of the Factories Act (Cap 104, 1985 Rev Ed) indicated that the duties were absolute in the sense that once it was proved that the safeguards and machinery were not maintained or kept in position as required, the first plaintiff did not need to prove any lack of care on the part of the factory owner.
Summary of facts	"The first plaintiff, an infant, sued the defendant by his father and next friend for damages in respect of personal injuries he suffered during an industrial accident in the defendant's factory. The first plaintiff argued that the accident was caused by the defendant's negligence and/or breach of statutory duty. The first plaintiff had been employed by the defendant as a machine operator. The first plaintiff operated a plastic injection moulding machine. The machine had a gate guard which acted as an automatic safety device. When the gate guard was open, the moving mould should have remained stationary. At the time of the accident, the gate guard was open and the first plaintiff was removing a plate from the machine. Instead of remaining stationary, the moving mould closed on the first plaintiff's right hand. As a result of the accident, the first plaintiff's right index, middle and ring fingers had to be completely amputated. He was assessed to have 70% permanent incapacity for the purposes of estimating workmen's compensation."

Chapter 3:
Procedures for Pursuing Remedies

CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

1. INTRODUCTION

I. An outline of the chapter

1.1 The procedures mentioned in this chapter are mainly aligned to the needs of migrant workers who hold a work permit, or a special pass where the period that a migrant worker may remain in Singapore is concerned. However, migrant workers holding an S-pass who also wish to bring a claim in Singapore courts may also refer to the relevant sections explaining the process of bringing a civil claim in Singapore or from abroad.

1.2 Depending on the validity of the work permit, possible procedural routes will be explored in the following sections:

1.3 Section 2 will provide a broad overview and brief introduction to the routes of redress available to migrant workers, including negotiating with the employer, approaching the Ministry of Manpower (MOM) and pursuing a civil claim.

1.4 Section 3 analyses the legal routes available when a migrant worker remains in Singapore, either through a valid work permit or, in the case of an expired or cancelled work permit, where the migrant worker holds a special pass.[1] With the exception of Foreign Domestic Workers (FDWs), migrant worker claims can be brought to MOM, and through the MOM route.[2] The migrant worker may undergo optional mediation, and subsequently decide to go to MOM's Labour Court, where the migrant worker may obtain a judgment by the Assistant Commissioners for Labour (ACL).[3] Alternatively, migrant workers may be able to pursue civil claims in the District Court, Magistrates' Court or the Small Claims Tribunal (SCT).[4]

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[1] A "special pass" is a pass issued at the discretion of the immigration official, or MOM official, as authorised by the immigration official under regulation 15 of the Immigration Regulations. It allows the holder to enter or remain in Singapore for a period of time not exceeding one month. See *Immigration Regulations* (Cap 133, Reg 1, 1998 Rev Ed Sing), reg 15. See Section 6.VIII for the text of the law.

[2] Note that because foreign domestic workers (FDWs) are not covered by the *Employment Act* and the *Work Injury Compensation Act*, the MOM procedures covered in this manual are not applicable to FDWs. However, they can still take the civil route and bring civil claims to the District Court, Magistrate's Court or Small Claims Tribunal (SCT). See *Employment Act* (Cap 91, 2009 Rev Ed Sing), s 2 [*EA*]; *Work Injury Compensation Act* (Cap 354, 2009 Rev Ed Sing) Fourth Schedule [*WICA*]. See Section 6.V and Section 6.XIII the text of the law.

[3] As ACLs, the directors and some of the Prosecuting Officers adopt a quasi-judicial role in adjudicating disputes relating to claims under the Act. See *WICA*, *supra* note 2, s 2A; MOM, *Divisions and Statutory Boards: Legal Services Department,* online: Ministry of Manpower <http://www.mom.gov.sg>.

[4] Note that the SCT route is rather limited. See Section 3.IV.C below.

1.5 Section 4 explains the legal routes available when the migrant worker no longer holds a valid work pass and hence, must return to their home country. For those who have already returned home, an existing MOM judgment can be enforced via an application for a Writ of Seizure and Sale (WSS) or a Garnishee proceeding.[5] Alternatively, the migrant worker may attempt to raise a civil claim remotely, through a Singapore-licensed lawyer.[6]

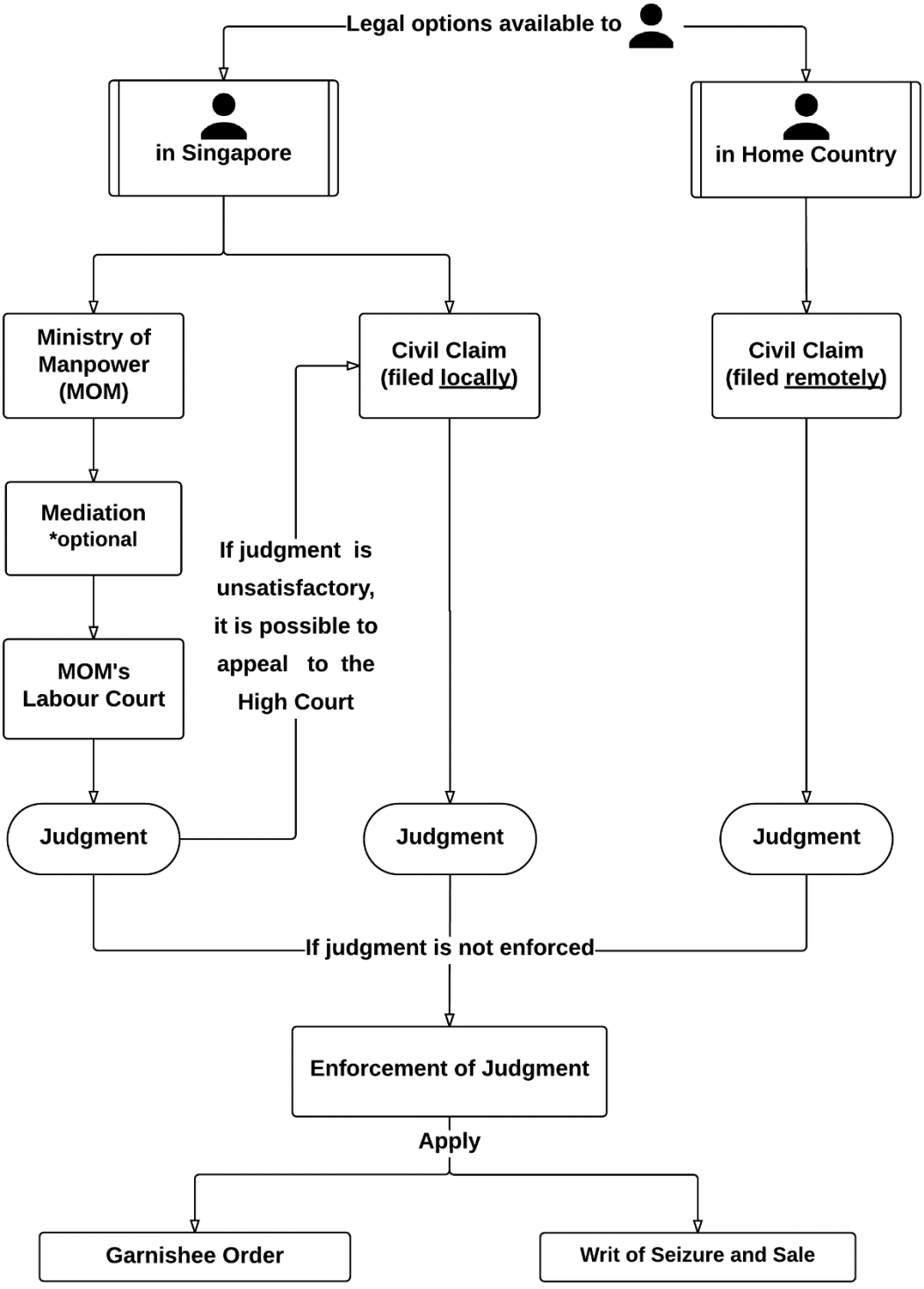
1.6 Section 5 provides a conclusive summary of this chapter.

1.7 Section 6 consists of the relevant statutes and case law that are referenced in this chapter.

[5] See Section 4.II.B. below.

[6] See Section 4.III. below.

Chart 1: An overview of the legal options available to migrant workers



II. Migrant workers in Singapore – holding a work pass

1.8 The legal routes available to migrant workers who wish to bring legal claims range from approaching the Ministry of Manpower (MOM), while they are still in Singapore, to bringing up a civil claim from abroad when they have returned to their home countries. The legal options available to the client are closely linked to the length of time they can remain in Singapore, which in turn depends on whether the client holds a valid work pass.

1.9 In order to work in Singapore, all non-residents must hold a valid work pass. Employers who hire a foreign worker who does not hold a work pass can be prosecuted under the *Employment of Foreign Manpower Act* (EFMA).[7]

1.10 Briefly, the work passes foreign workers commonly hold are:[8]

- Employment Pass for those who earn a fixed monthly salary of at least $3,300 and hold professional qualifications;[9]
- S-Pass for mid-level skilled workers who earn a fixed monthly salary of at least $2,200;
- Work permit for low-skilled or semi-skilled workers.

1.11 This available routes covered in this manual are mostly only applicable to workers holding a work permit or, if the work permit has expired or been cancelled, a special pass. This does not mean to say that S-pass workers have no recourse. S-pass workers may still bring claims via the civil route.

1.12 The following section will explain more about the difficulties that migrant workers face while pursuing claims in Singapore and explore the process of pursuing claims in Singapore via the MOM route and the civil court.

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[7] *Employment of Foreign Manpower Act* (Cap 91A, 2009 Rev Ed Sing), s 5 [*EFMA*]. See Section 6.VI for the text of the law.

[8] Ministry of Manpower, *Foreign Manpower: Passes & Visas,* online: Ministry of Manpower <http://www.mom.gov.sg>. [MOM, *Passes & Visas]*

[9] All dollar figures stated in this chapter are in Singapore dollars unless otherwise noted.

2. OVERVIEW OF THE AVAILABLE ROUTES TO REMEDY FOR MIGRANT WORKERS

2.1. There are three main ways that a migrant worker (the client) may bring a claim against their employer: conducting negotiations directly with the employer, approaching MOM and lastly, bringing a claim in civil court. These will be explained respectively in Sections I, II and II.

I. Negotiating with the employer

2.2. Lawyers may assist and represent their clients in settlement negotiations with the client's employer prior to pursuing action through MOM or Civil Court. This type of negotiation is entirely distinct from negotiations conducted under the MOM route (discussed below). Unfortunately, migrant workers who are still employed have weak bargaining power, as the employer can terminate the migrant worker's employment and work permit with relatively little difficulty, resulting in repatriation[10] within seven days.[11] Migrant workers may also be reluctant to pursue negotiations for fear of retaliation, [12] ill-treatment and harassment against themselves or their family members in their home country by agents of the employer,[13] although this fear may extend to any attempts of redress. Employers may also believe that they can wait until the expiration of a migrant worker's work permit, which would render pursuing a claim within Singapore unfeasible, forcing the client to pursue their claim from abroad.

2.3. It is therefore important for practitioners[14] to alert employers that a client can nevertheless pursue a claim through the MOM route, and that clients may still proceed with their claim even after returning home. This may improve a client's

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[10] See Section 3.II below; TWC2 News, "Our Stand: Work permit holders should be free to change employers and stay longer" (17 October 2013), online: Transient Workers Count Too <http://twc2.org.sg>. [TWC2 News, "Our Stand: Work permit holders"].

[11] An employer must arrange for the departure of the worker within the following seven days. A migrant worker will face serious consequences, including fines, if he remains in Singapore past this point. See MOM, *Foreign Manpower: Passes & Visas, Work Permit (Foreign Worker) – Cancellation & Renewal,* online: <http://www.mom.gov.sg>. [MOM, *Cancellation & Renewal].*

[12] There have been cases of forced repatriation, sometimes prematurely, with the help of repatriation companies. See Jolovan Wham, "Repartriation [*sic*] Companies – Manpower Minister's response belittles the efforts of migrant workers" (30 November 2011), online: The Online Citizen <http://www.theonlinecitizen.com> [Wham, "Repartriation Companies – Manpower Minister's response"]; Wham, "TOC Expose: Repatriation companies" (14 January 2009), online: The Online Citizen <http://www.theonlinecitizen.com>; Joyce Wong, "Gripped by two repatriation agents, Monjor is taken to airport" (30 March 2014), online: Transient Workers Count Too <http://twc2.org.sg>.

[13] There have been cases of illegal detention and beatings. See Au Waipang, "Crime and ambivalence" (17 November 2011), online: Yawning Bread < http://yawningbread.wordpress.com>; Farah, "Foreign worker told: 'if we kill you there won't be any witness'" (25 July 2012), online: Transient Workers Count Too <http://twc2.org.sg>.

[14] This manual uses the term "practitioners" in its broadest sense to refer to people of all professions who work with and on behalf of migrant workers, including lawyers, case workers, social workers, activists, non-legally trained advocates, etc.

bargaining position, as an employer will understand that they cannot simply terminate and send their employee home without fear of legal action.

2.4. Even after the client returns home, practitioners can remain in contact with their clients, and help them pursue a civil claim remotely. In this regard, practitioners should obtain detailed contact information from the client. See Chapter 4 for additional information, but the most critical information will include:

- Full name;
- Postal and residential address;
- Email address (if any);
- Telephone numbers; and
- Next of kin details.

2.5. Where negotiations with the employer are successful, a clear and accurate written record of the agreement should be drafted, signed and dated by both parties (and preferably witnessed). Where negotiations are refused or unsuccessful, the client may bring their claim to MOM or even start a civil claim in Singapore or from their home country. In such a case, employers can be forewarned that the failure to negotiate may result in a more favourable outcome for the client, as MOM may look upon the client's case more positively where negotiation was attempted. [15] **A written record of attempted negotiations will be helpful in proving to MOM that a good faith effort to solve the dispute was attempted.**

II. Approaching the Ministry of Manpower (MOM)

2.6. MOM has a number of mechanisms to resolve many of the legal issues migrant workers face in connection with their employment:

2.7. Excluding FDWs,[16] migrant workers who suffered injuries at work may claim compensation under the *Work Injury Compensation Act* (WICA).[17] Those who experienced issues with their employment, such as non-payment of wages may bring a claim under the *Employment Act* (EA). Other claims include those against employment agencies, which can be brought up under the *Employment*

[15] MOM may look upon the client's case more positively where the client attempted negotiation but was refused by the employer. Similarly for civil claims, pursuant to the Rules of Court, the court may in exercising its discretion as to costs take into account "the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution." Hence, there may be possible adverse costs orders against the employer where negotiations were refused. See *Rules of Court* (Cap 322, R 5, 2006 Rev Ed Sing), o 59 r 5(c) [*Rules of Court*]. See Section 6.X for the text of the law.

[16] *Supra* note 2.

[17] *WICA*, *supra* note 2, s 3(1). See Section 6.XIII for the text of the law.

Agencies Act (EAA).[18] For those who have experienced illegal deployment or employment, migrant workers can technically notify MOM of infringements of employment regulations under EFMA. However, migrant workers may be sanctioned for participating in illegal activity unless they can prove they were unaware of the illegal act. Practitioners should thus fully assess the clients' cases prior to filing a complaint with MOM.

2.8. Through these complaint procedures, migrant workers can obtain judgments that have the force of law. Note however that MOM judgments usually result in monetary remedies such as damages and compensation rather than injunctive remedies. The procedure for these commonly pursued claims by migrant workers is discussed in detail in Section 3.

III. Bringing a claim to Singapore's civil court

2.9. Migrant workers have the option of choosing not to go through the MOM route and instead bring up their claims in civil court. Such claims may range from common law claims, such as negligence, to statutory claims such as the the EA and WICA. Before introducing the various courts where civil claims may be heard, a brief introduction to the Singapore court system may be helpful.

2.10. The Singaporean court system consists of two tiers – the State Courts and the Supreme Court.

2.11. The State Courts include three courts that hear civil claims:[19]

- The District Court hears claims for amounts in dispute that do not exceed $250,000; [20]
- The Magistrate's Court hears claims for amounts in dispute not exceeding $60,000; and
- The Small Claims Tribunal (SCT) hears any claim not exceeding $10,000 (or up to $20,000 where both parties to the dispute agree) which arises from a dispute regarding a contract for the sale of goods, the provision of services, or in tort, where there is damage caused to any property. The latter excludes damage sustained in an accident arising out of or in connection with the use of a motor vehicle.

2.12. The Supreme Court consists of the High Court and the Court of Appeal:

- The High Court hears civil claims for amounts in dispute exceeding $250,000;[21] and

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[18] MOM normally directs these workers to the Small Claims Tribunal to lodge their complaint. However, MOM does not extend special passes to employment agency claims, thus it is difficult for the migrant worker to remain in Singapore to see through their claims if their work permits are cancelled or expire. See H.O.M.E. & TWC2, *Justice Delayed, Justice Denied: The Experiences of Migrant Workers in Singapore* (2010) at 26, online: Transient Workers Count Too <http://twc2.org.sg/wp-content/uploads/2013/09/Justice-Delayed-Justice-Denied-ver2.pdf>. [H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*].

[19] Civil Justice Division, *Processes & Procedures: Going to Court on Civil Matters,* online: <https://app.statecourts.gov.sg>.

[20] "Amount in dispute" refers to the amount that the claimant, i.e. the client, is trying to claim through his lawsuit.

- The Court of Appeal hears appeals of cases from the High Court.[22]

2.13. Parties may appeal against any decision from the State Courts, whether given by a District Judge or Magistrate to the High Court.[23] From the High Court, parties may appeal to the Court of Appeal unless the claims are barred from appeal under the law.[24]

2.14. Generally, a migrant worker's claim does not exceed $250,000 and hence they should bring their claims to the District Court, Magistrate's Court or, where appropriate, the SCT. More on how to make a civil claim in Singapore and from overseas can be found below in Sections 3 and 4 respectively.

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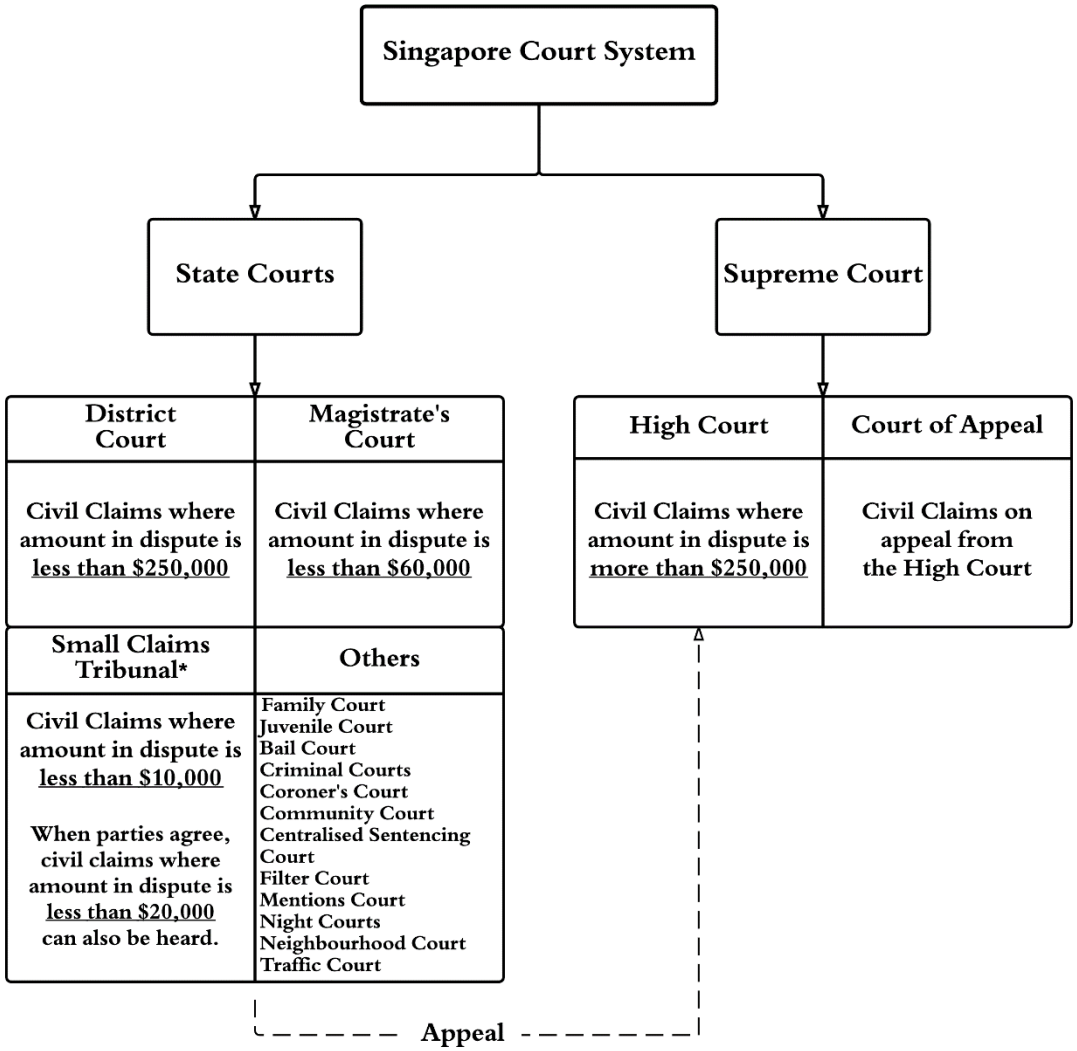
[21] The Law Society of Singapore, *You & the Law: Singapore Court System*, online: The Law Society <http://www.lawsociety.org.sg/forPublic/YoutheLaw/SingaporeCourtSystem.aspx>.

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid*.

Chart 2: An overview of the Court System in Singapore



*** Note that the SCT's jurisdiction is quite limited. See**

3. LEGAL OPTIONS AVAILABLE TO MIGRANT WORKERS IN SINGAPORE

I. Introduction

3.1. Migrant workers entering Singapore hold work permits which are generally valid for up to two years.[25] Clients thus have a limited period in which they may approach MOM or commence a civil claim to resolve disputes with their employer or with Singaporean employment agencies (such as wage disputes, lack of compensation for workplace injury, etc.). In the absence of a special pass, the expiry of the work permit would interrupt any legal proceedings that the migrant worker wishes to bring, whether to MOM or in civil court.

3.2. Section 3 has been further divided into the following: Part II elaborates the situation faced by migrant workers in trying to remain in Singapore in order to complete their legal proceedings. Part III of this section will explain the MOM avenues available to the migrant worker. Part IV will explain the process of commencing a civil claim within Singapore.

II. The difficulties of remaining in Singapore

3.3. Migrant workers generally face difficulties pursuing claims while they are in Singapore due to the limited period they actually have to remain in Singapore. The expiry or cancellation of their work permits leave workers no choice other than to return home unless they are able to acquire a special pass. However, while the period of their stay is lengthened, holding a special pass imposes certain restrictions on workers – the most important being unable to work which leads to workers being unable to support themselves and their family members financially. A scheme has been put in place to allow workers to have a job temporarily, however, there are still a number of workers who fall through the gaps of the Temporary Job Scheme (TJS). These will be explained through Parts A to E below.

A. Immigration issues

3.4. Generally, migrant workers hesitate to pursue claims while employed, due to the fear of losing their job and their work permits cancelled by their employer or by MOM.[26] Without a work permit, migrant workers are unable to remain or work in Singapore legally.[27] Migrant workers holding work permits are tied to their employer, as employers must pay a security bond to MOM to guarantee repatriation of the worker when the work permit expires or is cancelled.[28] Under

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[25] MOM, *Cancellation & Renewal*, *supra* note 11.

[26] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 9.

[27] *EFMA*, *supra* note 7, s 5. See Section 6.VI for the text of the law.

[28] MOM, *Foreign Manpower: Work Permit (Foreign Worker) – Security Bond,* online: Ministry of Manpower <http://www.mom.gov.sg/foreign-manpower/passes-visas/work-permit-fw/before-you-apply/Pages/security-bond.aspx>.

this system, unless the migrant worker leaves Singapore and returns home, they are unable to acquire a new work permit and new employer.[29] Migrant workers are hence highly dependent upon their employers in order to maintain their jobs and work permits. They risk their livelihood and the legal status to work in Singapore when they file a complaint against the employer through MOM.

3.5. Moreover, employers may take measures to forcibly repatriate migrant workers, an unfortunately common practice.[30] In the absence of explicit provisions for termination in the employment contract, the EA stipulates minimum notice for termination by either the worker or the employer.[31] This period ranges from just one to four weeks (the less time the worker has been employed, the shorter the period of notice), meaning that workers may be terminated at little more than a moment's notice.[32] Employers further have the power to cancel a worker's work permit unilaterally, by following a simple online procedure, without any requirement to establish that notice of termination of employment has been given in accordance with the EA.[33]

3.6. These vulnerabilities often force migrant workers to wait until the end of their contract to file claims, usually after two years.[34] This results in the following problems:

- There is little time to see through claims before the worker must return home
- Claims brought under the EA or worker's compensation under WICA are subject to a time bar of **one year**.[35]

3.7. However, these problems can be partially avoided if the migrant worker is able to obtain a special pass after their work permits have expired or have been cancelled.

B. Special pass for temporary residency

3.8. Under immigration regulations, migrant workers may be granted a "special pass" which allows them to remain in Singapore, pending processing or adjudication of their claims. [36] This pass is issued at the discretion of MOM, based on whether the Ministry "assesses that a worker has a legitimate reason to stay on in Singapore to resolve a dispute or claim against the employer or to obtain

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[29] TWC2 News, "Our Stand: Work permit holders", *supra* note 10.

[30] Wham, "Repartriation [*sic*] Companies – Manpower Minister's response", *supra* note 12.

[31] *EA*, *supra* note 2, s 10. See Section 6.V for the text of the law.

[32] *Ibid*.

[33] Work permits may be cancelled through a simple online process. See MOM, *Cancellation & Renewal*, *supra* note 11, "Step-by-Step Guide on Cancellation of a Foreign Worker's Work Permit"; MOM, *Statistics & Publications: "How do I cancel my foreign worker's work pass?",* online: Ministry of Manpower <http://www.mom.gov.sg/Documents/statistics-publications/Brochures/cancel-fw-work-permit-english.pdf>.

[34] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 9.

[35] See Section 3.21 and 3.27 below.

[36] *Immigration Regulations*, *supra* note 1, reg 15. See Section 6.VIII. for the text of the law.

medical treatment and complete the work injury compensation process."[37] Special passes can be issued for periods of no longer than one month. These passes are usually only extended when MOM decides to investigate the worker's employer, and desires to allow the worker to remain legally until the investigation concludes.[38]

C. Limitations on holding a special pass

3.9. There are a number of difficulties in obtaining the special pass, including:

- MOM will only issue special passes to workers with salary or work injury compensation claims and other similar allowable claims arising directly out of their authorized employment in Singapore;
- Workers seeking other claims, such as recovering fees paid to agents, will generally not be issued a special pass;[39] and
- Workers bringing claims against an employment agency will generally be directed by MOM to the SCT or other civil courts to lodge their complaint.[40]

3.10. Most importantly, without a special pass legalising their stay in Singapore, migrant workers have very limited time[41] to conclude their claims in the jurisdiction.

3.11. Migrant workers who do hold a special pass still face a number problems. While an MOM Channel claim can now typically be concluded in less than a year,[42] migrant workers may lack accommodation[43] in the interim and face financial hardships, as they will not be permitted to work without special dispensation under the Temporary Job Scheme, which is discussed below.[44] If a migrant worker obtains illegal employment, they can be subject to warnings, fines or imprisonment[45] which will usually result in repatriation and a dismissal of their claims by MOM.[46]

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[37] MOM, *Newsroom, Press Replies Detail, "*Who's required to stay for cases: MOM", online: Ministry of Manpower <http://www.mom.gov.sg/newsroom/Pages/PressRepliesDetail.aspx?listid=224> [MOM, "Who's required to stay for cases: MOM"].

[38] Debbie Fordyce, "Nabbing immigration offenders affects special pass holders too" (28 September 2005), online: Transient Workers Count Too <http://twc2.org.sg> [Fordyce, "Nabbing immigration offenders affects special pass holders too"]; MOM, "Who's required to stay for cases: MOM", *ibid*.

[39] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 26.

[40] *Ibid.*

[41] *Supra* note 11, migrant workers would only have a maximum of seven days before they must leave Singapore and go back to their home country.

[42] Fordyce, "Nabbing immigration offenders affects special pass holders too", *supra* note 38.

[43] TWC2 News, "Our Stand: Housing workers who are on special passes" (17 October 2013), online: Transient Workers Count Too <http://twc2.org.sg>.

[44] Fordyce, "Nabbing immigration offenders affects special pass holders too", *supra* note 38.

[45] *EFMA*, *supra* note 7, s 5(7). See Section 6.VI below.

[46] Fordyce, "MOM tough on worker, lets employer run rings around laws" (2 January 2013), online: Transient Workers Count Too <https://twc2.org.sg>.

D. Temporary Job Scheme (TJS)

3.12. Some special pass holders [47] may be eligible for MOM's discretionary Temporary Job Scheme (TJS), which supports workers in finding paid employment while they assist MOM in an investigation or act as witnesses in any prosecutions. Under the TJS, migrant workers on Special Passes are "matched" with potential employers through a central data repository. Once matched, an employer can apply to MOM for a work permit for the worker. MOM may then issue a work permit to that migrant worker for 6 months.[48] MOM has the discretion to extend these work permits.[49]

3.13. However, the TJS may not be the best solution for a migrant – the process to secure a job is slow[50] and a worker will not be guaranteed a job[51] as the availability of work depends on market conditions and the number of employers who choose to participate in the TJS.[52] In fact, few employers are actually aware of this scheme, and employers who know of the TJS may be reluctant to hire such migrant workers, as they are viewed as "troublemakers" because they have already filed a claim with MOM.[53] As a result, there are only a limited range of jobs available on the TJS [54] that have low pay and potentially unsatisfactory working conditions.[55] In addition, accommodation and food are not always provided by the employers.[56] Thus, the TJS may be ineffective in alleviating the migrant worker's financial burden while they wait for their claims to be processed in Singapore.

E. Cancellation/expiry of work permit

3.14. Where a migrant worker's work permit has expired or is cancelled by the employer prematurely, the migrant worker will not be allowed to stay legally in Singapore unless MOM issues them a special pass.[57] Again, MOM grants special passes for claims pursued through MOM, but it will not issue special passes to workers who wish to pursue civil claims.[58] If a migrant worker wishes

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[47] Note, not all workers under the Special Pass will fall under the TJS, such as workers pursuing salary claims or work injury compensation claims. Workers helping with investigations may include investigations against criminal offences of employers. See H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 29.

[48] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 29

[49] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 29.

[50] Alex Au, "Amin and his abusive employers" (13 September 2012), online: Transient Workers Count Too <http://twc2.org.sg>.

[51] Fordyce, "The perfect job" (3 February 2012), online: Transient Workers Count Too <http://twc2.org.sg>.

[52] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 29.

[53] Au, "Made to stand in the corner like children" (26 July 2013), online: Transient Workers Count Too <http://twc2.org.sg> [Au, "Made to stand in the corner like children"].

[54] Fordyce, "Nabbing immigration offenders affects special pass holders too", *supra* note 38.

[55] Nguyen Minh Quan, "Frustrating time as Badal waits for ministry to look into salary deductions" (18 June 2014), online: Transient Workers Count Too <http://twc2.org.sg>.

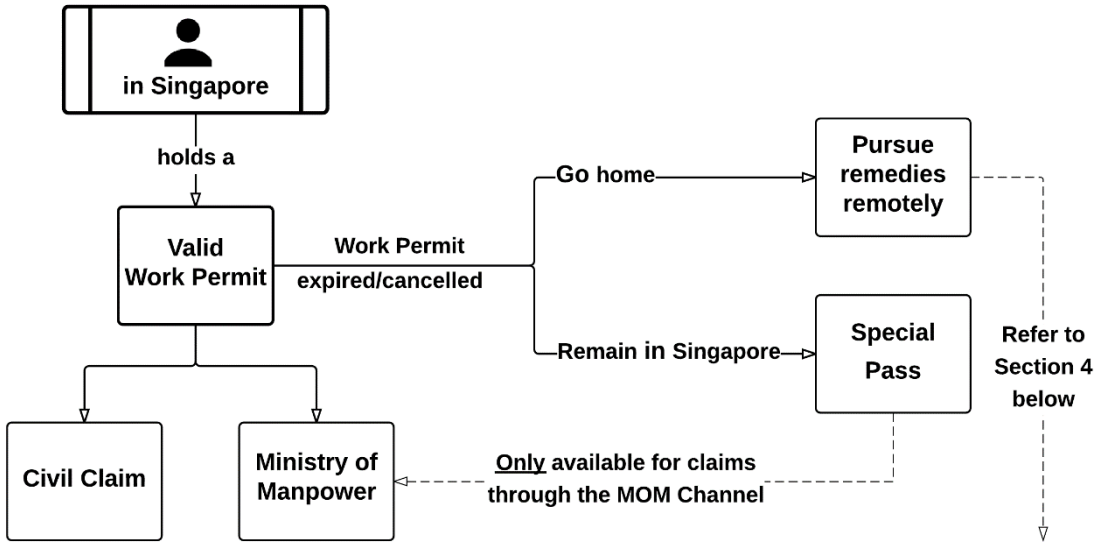
[56] Au, "Made to stand in the corner like children", *supra* note 53.

[57] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 26.

[58] *Ibid.*

to pursue a claim, but is unable to remain in Singapore as they do not hold a valid work permit or special pass, they must return to their home country and can only pursue a civil claim remotely. Section 4 will discuss alternative legal routes available when the migrant worker has returned to their home country.

Chart 3: An overview of the legal routes available to a migrant worker pursuing a claim in Singapore



III. Using the Ministry of Manpower (MOM) route

3.15. Bringing a civil claim in Singapore courts can be a costly and prolonged process. Instead, migrant workers may elect to seek redress through mechanisms available within MOM. The MOM route is only available to migrant workers who are physically present in Singapore;[59] and who hold a valid work permit or special pass. This segment will explore in detail two of the most common claims that migrant workers, excluding foreign domestic workers,[60] may bring.[61]

[59] When lodging a claim or complaint under the EA, MOM may require workers to attend meetings scheduled with an MOM officer and the worker's ex-employer. If the worker fails to attend the scheduled meetings, the case lodged with MOM would not be processed and verified. See MOM, *Employment Standards Online (ESOL)*, online: Ministry of Manpower <http://www.mom.gov.sg/services-forms/labour-relations/Pages/esol-individual.aspx>; When lodging a claim under WICA, the client may be required to attend pre-hearing conferences, when a notice is served upon him. The failure to attend the pre-hearing conferences would be to the disadvantage of the worker. See WICA, *supra* note 2, s 25B and s 25C. See Section 6.XIII for the text of the law.

[60] Domestic workers are explicitly excluded from the EA or WICA claims. First, domestic workers are explicitly excluded from the definition of "employee" within section 2 of the EA, and hence they are not covered by the EA. Second, the Fourth Schedule "classes of persons not covered" of WICA similarly excludes "a domestic worker, being any person

3.16. An MOM claim can normally be concluded in less than a year.[62] However, where the migrant worker is required or decides to leave the country, redress under the MOM mechanisms will be discontinued.

3.17. If the client wishes to bring up claims regarding their employment, such as wage disputes, they should bring a claim under the EA. If the client has suffered a work-related injury, they should bring a claim under WICA. See Chapter 2 for the substantive issues involved in each of these claims. Note that these two routes are not available to FDWs.[63]

A. Employment Act (EA) claims

3.18. The EA covers employees under a contract of service with an employer. **It excludes domestic workers and certain other limited categories of workers.**[64] Claims for violations under the EA are handled by the Labour Relations and Workplaces Division (LRWD) of MOM. Complementing the substantive considerations outlined in Chapter 2, this section will focus on the process of making a claim under the EA via the MOM route.

i. Time bar to claim under the Employment Act (EA)

3.19. Two time bars limit the availability of making a claim through the EA.

3.20. First, for both mediation and MOM's Labour Court processes, the migrant worker must lodge the case with MOM within **6 months** from the date of the termination of their employment.[65] For example, if the contract of service was terminated on 1 January 2014, the claim must be filed by 30 June 2014.

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employed in or in connection with the domestic services of any private premises" from its provisions on compensation for workplace injuries and occupational illnesses. See *EA*, *supra* note 2, s 2. See Section 6.V for the text of the law; *WICA*, *supra* note 2, Fourth Schedule; See above, *supra* note 2. See Section 6.XIII for the text of the law.

[61]Additionally, should the client have any claims against an employment agency, he may bring up a claim under the Employment Agencies Act (EAA). Note that MOM does not allow migrant workers pursuing agency fee-related claims to hold a special pass when their work permit is terminated. See *Employment Agencies Act* (Cap 92, 2012 rev Ed Sing); *Employment Agencies Rules 2011* (Cap 92).

The client may also bring up issues such as illegal employment, illegal deployment and making false declarations to MOM, as these are infringements to the Employment of Foreign Manpower Act (EFMA). It is important to note that migrant workers are not allowed to pursue salary claims for illegal deployment, which occurs when employers deploy the workers to do jobs in other sectors or companies that are not stated in their work permit. This is to discourage workers to continue to work illegally at other jobs or companies without reporting it to MOM. See *EFMA, supra* note 1. See Section 6.VI. for the text of the law.

[62] Fordyce, "Nabbing immigration offenders affects special pass holders too", *supra* note 38.

[63] *Supra* note 2. See also *supra* note 60.

[64] *Supra* note 2. See also *supra* note 60. See also MOM, *Employment Practices, The Employment Act: Who it covers*, online: Ministry of Manpower <http://www.mom.gov.sg>. See also Chapter 2, Section 2.13 – 2.17.

[65] *EA*, *supra* note 2 s 115(2). See Section 6.V. for the text of the law.

3.21. Second, under the EA, MOM is only empowered to enquire into issues arising **less than one year** from the date of the lodgement of the claim.[66] This applies to both voluntary mediation[67] and for adjudication under MOM's Labour Court.[68] Hence, where a migrant worker waits to lodge a salary claim at the end of a two year contract, for example because they are fearful of reprisal, and the claims for salary arrears from the first year of employment will be barred.[69]

3.22. Alternatively, workers pursuing redress for disputes covered by the EA may choose to file a claim with the civil courts. When filing a civil claim, clients will not be restricted by the one year time bar and will instead be subject to a much longer **six year limitation**.[70]

ii. Process of lodging a claim through the Employment Act (EA)[71]

3.23. A migrant worker can lodge a claim under the EA through the Employment Standards Online (ESOL) portal.[72] Note that for both mediation and Labour Court processes described below, both parties must be present and cannot be represented by lawyers.[73] However, as the employer is technically a company, the company can send an officer other than the employee's direct supervisor or the company president.

1) Mediation

3.24. Following the lodging of the claim, the LRWD will review the claim and an advisory officer may conduct a voluntary mediation session, at no charge, for the worker and the employer. Alternatively, the client can opt to lodge their claim directly with MOM's Labour Court.

2) Adjudication by MOM's Labour Court

3.25. Post-mediation, where one or both parties are dissatisfied with the result of the mediation process, they can apply for adjudication by MOM's Labour Court.[74]

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[66] *Ibid.*

[67] See also MOM, *Services & Forms, Employment Standards Online (ESOL)*, online: Ministry of Manpower <http://www.mom.gov.sg>.

[68] *EA*, *supra* note 2, s 115(2). See Section 6.V for the text of the law.

[69] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 14.

[70] As provided under the *EA* s 122, the time bar under the EA s 115, the Commissioner's power to inquire into complaints, does not apply to civil claims as "nothing in this part shall limit or affect the jurisdiction of any court". See EA, *supra* note 2, s 122; *EA*, *supra* note 2, s 115(2). See Section 6.V for the text of the law.

[71] *EA*, *supra* note 2, s 119. See Section 6.V for the text of the law.

[72] To lodge a claim under the EA, MOM has set up a portal called Employment Standards Online (ESOL). See MOM, *Services & Forms, Employment Standards Online (ESOL) for Individual Users,* online: Ministry of Manpower <http://www.mom.gov.sg>.

[73] Aris Tan, "Hired on Sufferance, China's Migrant Workers in Singapore" (2011) China Labour Bulletin Research Reports at 44; While a lawyer is not required, they may represent a client in bringing a WICA claim.

[74] Note that "Labour Court" and "Labour Tribunal" have been used interchangeably in the literature. As Labour Court now appears to be the prevailing usage, the term Labour Court will be used throughout.

The application cost for a hearing is $3. Both parties present their cases, following which the Assistant Commissioner for Labour (ACL) will issue a judgment.[75]

B. Work Injury Compensation Act (WICA) claims

3.26. WICA provides compensation to workers when they sustain injuries or contract an illness while in the course of their employment in Singapore.[76] Please see Chapter 2 for an explanation of the substantive law.[77] This section will discuss the process of making a WICA claim.

i. Time Bar to claims under the Work Injury Compensation Act (WICA)

3.27. For those wishing to claim compensation, a time limit of **one year** exists, beginning from the date of the accident causing the injury or the date of death.[78]

ii. Process of lodging a claim through the Work Injury Compensation Act (WICA)

3.28. The claim process is divided into five steps:[79]

1) Reporting the incident;
2) Filing the claim;
3) Medical assessment;
4) Receipt by MOM of the assessment; and
5) Dispute resolution.

C. Additional notes

i. Work injury claims: comparing WICA & civil claims

3.29. Instead of pursuing a claim under the MOM route, clients may pursue a civil claim for compensation under common law. These two routes of redress for a work injury differ in two critical aspects.

3.30. First, compensation under a civil claim is not capped, unlike the WICA claim.[80] However, it is more difficult to establish employer liability under a civil claim, as the claimants must prove that the employer was at fault.

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[75] Note that ACLs may not be legally trained.

[76] *WICA*, *supra* note 2, s 3(1). See Section 6.XIII. for the text of the law.

[77] See Chapter 2, Section 5.

[78] *WICA*, *supra* note 2, s 11. See Section 6.XIII. for the text of the law.

[79] MOM, *Workplace Safety & Health, Work Injury Compensation, I am the employee*, online: Ministry of Manpower <http://www.mom.gov.sg>.

[80] Chapter 2 Section 5 for statutory caps.

3.31. Second, these channels cannot be pursued at the same time. If the client has seen through a claim in civil court, they would be barred from access to the MOM route and vice versa.[81] However, a worker may proceed with a civil claim as long as they withdraw their WICA Claim before an order by the ACL has been made.[82] Likewise, a worker who withdrew their claim in civil court, before a judgment is made, is able to proceed with WICA claim as long as it is within the time bar of one year from the accident.[83]

3.32. The differences between pursuing a WICA claim and raising a civil claim stated here are not exhaustive. A more detailed comparison between a WICA claim and a civil claim can be found in Chapter 2, Section 5.

ii. **Compensation limits: comparing EA & WICA**

3.33. Under the EA, the amount of compensation a worker can obtain will vary based on the amount of disputed wage or salary.[84]

3.34. However, under WICA, compensation is calculated based on the type of injury, and is capped at certain amounts.[85] Recently, new compensation limits have been added.[86] The new compensation limits are applicable to accidents that occurred on and after 1 June 2012. The existing compensation limits will continue to apply to all accidents that occurred before 1 June 2012. A full table on the revisions in compensation limits can be found in Chapter 2 section 5.IV.A, table 10.

3.35. The differences between making a WICA claim and an EA claim can be summarised briefly in the table below:

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[81] *WICA*, *supra* note 2, s 33. See Section 6.XIII. for the text of the law.

[82] *Yang Dan v Xian De Lai Shanghai Cuisine Pte Ltd* [2010] SGHC 346. [2011] 2 SLR 379. The judge ruled that if a pre-hearing conference was held and an agreement to settle all matters was reached at that hearing, the Commissioner may record a Settlement Order. Once a Settlement Order was made, the workman would lose his right to withdraw his WICA Claim and cannot proceed with a civil claim. If the workman did not agree to a settlement of all matters at the pre-hearing conference, the workman still has his right to withdraw. However, after the WICA claim has proceeded to a hearing and if the Commissioner made a Post-Hearing Order, it would be too late for the workman to withdraw his WICA claim or to proceed with a civil claim. However, a workman may proceed with a civil claim as long as he withdraws his WICA claim before an order by the ACL has been made. See Section 6.XIII. for a summary of the case.

[83] MOM, *Work Injury Compensation Act: Frequently Asked Questions*, online: Ministry of Manpower <http://www.mom.gov.sg> [MOM, *WICA: FAQ*].

[84] See Chapter 2 Section 2.I.C. for more details.

[85] See Chapter 2 Section 5.II. for comparison of pursuing claims via WICA versus tort in civil law. See also MOM, *WICA: FAQ*, *supra* note 83.

[86] MOM, *Newsroom, Highlight Details, Changes to Work Injury Compensation Act,* online: Miniistry of Manpower <http://www.mom.gov.sg>.

Table 1: Comparison between a WICA claim and an EA claim

WICA Claim	EA Claim
Compensation is capped	Compensation may vary based on the amount that the migrant worker is trying to claim
Amount of compensation will depend on the type of injury suffered	

IV. Commencing a civil claim while the client is in Singapore

3.36. A migrant worker wishing to bring a civil claim while in Singapore must hold a valid work permit or some other valid residency status, as MOM will not grant special residency passes for migrant workers who are seeking claims in civil court.[87] When the work permit expires or is cancelled, and the worker has no other form of valid residency, they will be forced to pursue a claim remotely. This is explored in Section 4 below.

3.37. Depending on the amount at stake, clients may decide to either bring a claim to the Magistrates' Court or District Court, explained in Part A, or to the Small Claims Tribunal, explained in Part B. Part C will elaborate on the costs that a civil claim may incur.

A. Bringing a civil claim to the Magistrates' Court or District Court

3.38. The Magistrates' Court deals with claims for which the amount in dispute does not exceed $60,000.[88] Most migrant workers will likely bring claims in this court. For larger amounts, the District Court handles claims amounts in dispute not exceeding $250,000.[89] Please see chart 4 below for a visual guide to the civil claim process.

i. Process of commencing a civil claim[90]

3.39. The client commences civil action by filing documents pursuant to an originating process under the Writ of Summons or originating summons.[91] Proceedings in which a substantial dispute of fact is likely to arise are commenced by Writ.[92] As

[87] H.O.M.E. & TWC2, *Justice Delayed, Justice Denied*, *supra* note 18 at 9.

[88] *Supra* note 19.

[89] Parties may also agree in writing to have the matter heard by the District Court, even though the sum in dispute exceeds $250,000. Where the plaintiff limits his claim to $250,000, the District Court can also hear the case.

[90] For more information about civil law processes, see Cavinder Bull SC, Yarni Loi & Jeffrey Pinsler, "Laws of Singapore: Overview- Ch. 02 Civil Procedure", online: SingaporeLaw <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview> [Bull, Loi & Pinsler, "Laws of Singapore: Civil Procedure"]

[91] *Ibid*.

[92] *Rules of Court*, *supra* note 15, o 5 r 2. See Section 6.X. for the text of the law.

such, most civil actions in tort and contract are commenced by way of a Writ.[93] An action will only be commenced by way of originating summons when it is required by statute or when there is a dispute concerned with matters of law where there is unlikely to be any substantial dispute of fact.[94] Clients are more likely to commence a civil action by way of a Writ.

3.40. The Writ is filed in the District Court or Magistrate's Court, by the worker making a claim (the plaintiff) and personally served[95] on the employer or the respective party against whom the claim is made (the defendant). This form of personal service is generally required throughout the litigation.

3.41. **If the claim is contested:** After being served the Writ of Summons, if the defendant wishes to contest the client's claim, they must inform both the Court and the client of their intention by entering an "appearance." [96] This is not a physical appearance but a memorandum of appearance (a document) which is filed and served through the Electronic Filing System.[97] The defendant must file a memorandum of appearance in Court within eight days after they have been served with the Writ of Summons.[98]

3.42. **Judgment in default of appearance:** If the defendant fails to enter an appearance within the time specified in the writ, the Court may enter a judgment against them. This may be a final judgment or an interlocutory judgment, depending on the nature of the claim. The Court, may, upon an application, however, set aside or vary such a judgment as it thinks is just.

3.43. **If there is a defence and counterclaim:** Within 14 days from the date of being served the Writ of Summons, the defendant must file their defence in Court and also serve a copy of their defence on the client's address of service or on the client's solicitors at their office address.

3.44. If the defendant alleges that they have any claim or is entitled to any relief or remedy against the plaintiff, the defendant may make a counterclaim in the

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[93] Bull, Loi & Pinsler, "Laws of Singapore: Civil Procedure", *supra* note 90.

[94] *Rules of Court*, *supra* note 15, o 5 r 3. Explanation found *ibid*. See Section 6.X for the text of the law.

[95] *Rules of Court*, *supra* note 15, o 62; See also Sing, *The Supreme Court Practice Directions*, (2013) part III s 33, online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/data/doc/ManagePage/98/ePD_WebHelp/ePD.htm>. [Sing, *The Supreme Court Practice Directions*]. See Section 6.X. for the text of the law.

[95] Personal Service can be effected by a solicitor or a solicitor's clerk. Court process servers will not be assigned to effect personal service of processes and documents unless there are special reasons. Solicitors are therefore required to notify the Legal Registry of the Supreme Court of the particulars, and any change thereof, of such clerks who have been authorised by them to serve processes and documents by filing Form 5 of Appendix A to these Practice Directions. Solicitors' clerks do not require the authorisation of the Registrar to effect personal service of processes and documents.

[96] *Rules of Court*, *supra* note 15, o 12 r 1; Jeffrey Pinsler, "Legal Systems In Asean – Singapore Chapter 4 – Legal Procedure (Civil)" at 2, online: ASEAN Law Association <http://www.aseanlawassociation.org/legal-sing.html>. [Pinsler, "Legal Procedure (Civil)"]. See Section 6.X. for the text of the law.

[97] Pinsler, "Legal Procedure (Civil)," *ibid*. at 3.

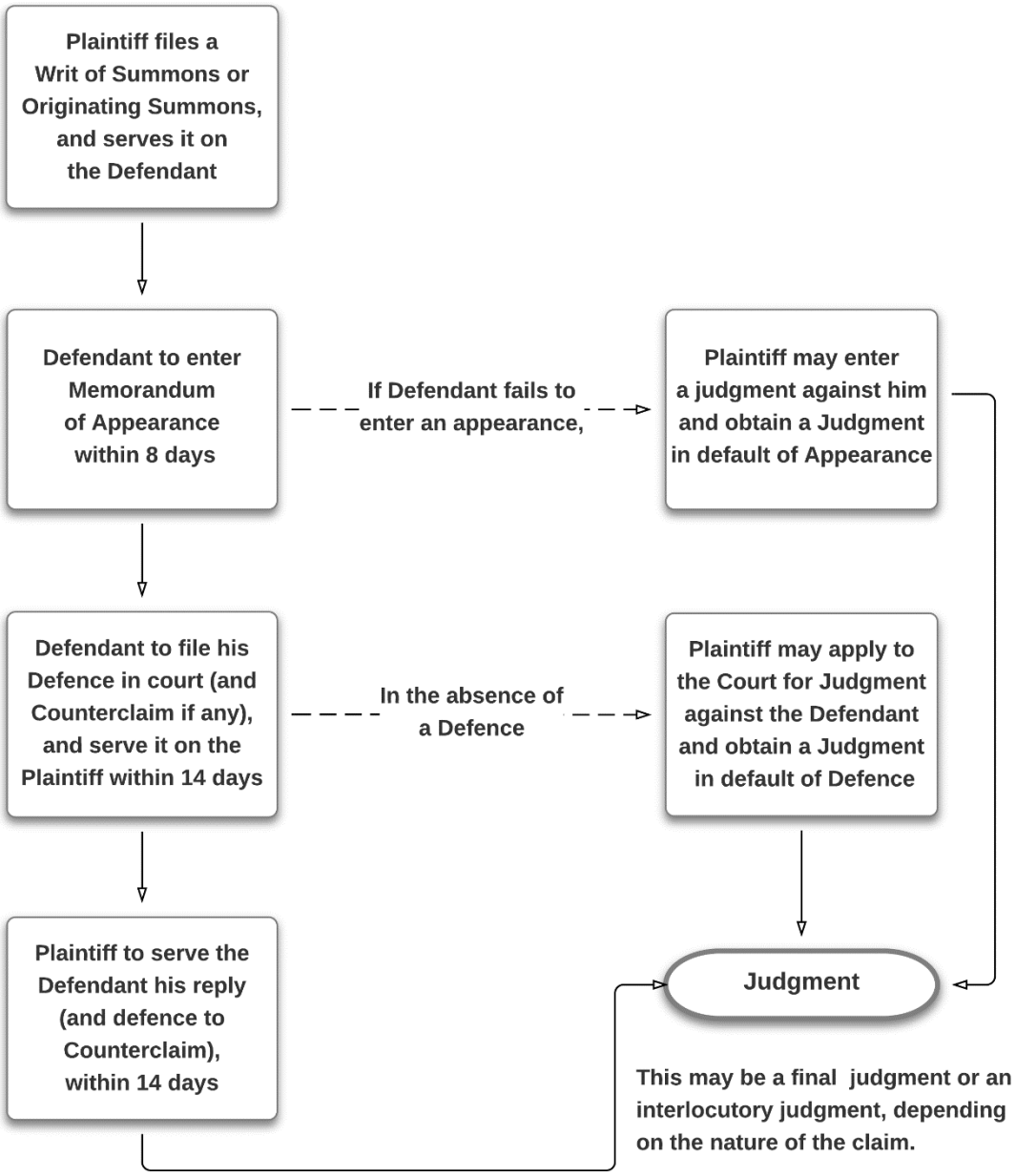
[98] *Ibid* at 3.

same action brought by the client. In this case, the pleading is known as the defence and counterclaim.

3.45. The plaintiff may serve on the defendant their reply (and defence to a counterclaim), within 14 days after the defence (and counterclaim) has been served on the plaintiff.

3.46. **Judgment in Default of Defence:** If the defendant has been served the Writ of Summons and has entered an appearance, but either has no defence to the claim or any part of the claim or does not file any defence, the plaintiff may apply to the Court for judgment against the defendant. This may be a final judgment or an interlocutory judgment, depending on the nature of the claim. However, upon application by the relevant party, the Court may set aside or vary such a judgment as it thinks is just.

Chart 4: The typical process of bringing a civil claim in Singapore



B. Security for costs

3.47. Clients returning home or who pursue a civil claim from abroad face the risk of a court order forcing them to pay a security deposit for their employer's legal costs. Employers must apply to the court for an order to pay security costs,[99] and must show that the case falls within one of the instances that allow the

[99] *Rules of Court*, *supra* note 15, o 23. See Section 6.X for the text of the law.

court to decide if it would be just to order the worker to pay security.[100] The court will consider all circumstances of the case in making its decision, including whether an order would be likely to prevent the plaintiff from pursuing a genuine claim. However, it may be possible for the client to appeal against a decision ordering payment of security.[101]

C. Bringing a civil claim to the Small Claims Tribunal (SCT)[102]

3.48. The Small Claims Tribunal (SCT) hears any claim not exceeding $10,000 (or up to $20,000 where both parties to the dispute agree) which arises from a dispute regarding a contract for the sale of goods, the provision of services, or in tort, where there is damage caused to any property.[103] While the costs of going to the SCT is more affordable, there are a number of limitations that will bar migrant workers from utilising this route.

i. Limits on the types of claims that the Small Claims Tribunal can hear

3.49. The SCT cannot hear employment claims or tort claims.[104] However it can hear claims arising from a contract for a provision of services.[105] In the migrant labour context, it could hear claims of an employment agency failing to guarantee legal jobs for migrant workers, or of an employment agency charging agent fees that are not in keeping with the EA.

3.50. Lawyers are not permitted to represent any of the parties in proceedings before the Tribunals. Unless the Tribunals decide that a claim is either vexatious or frivolous, costs are not awarded to the winning party. A time bar of **one year** exists to bring any claims to the SCT. If the incident happened more than one year ago, the SCT will not be able to hear the claim.

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[100] The most relevant element in this context is be *Rules of Court*, *supra* note 15, o 23, r 1(1)(a) "(1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court — (*a*) that the plaintiff is ordinarily resident out of the jurisdiction;...then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just".

[101] At the time of writing (September 2014), there is insufficient case law to describe the circumstances in which the courts will sustain a challenge to the employer's application for security costs.

[102] See generally The State Courts of Singapore, *Civil Justice Division, Small Claims Tribunal*, online: The State Courts of Singapore <https://app.statecourts.gov.sg>.

[103] The latter excludes damage sustained in an accident arising out of or in connection with the use of a motor vehicle; *supra* note 19.

[104] Small Claims Tribunal, "Checklist", online: The State Courts of Singapore <https://app.statecourts.gov.sg/sct/>.

[105] *Ibid.*

ii. Process of bringing a claim to the Small Claims Tribunal (SCT)

3.51. To lodge or file a claim at the SCT, the plaintiff may do so at the SCT physically or via fax.[106] The client must prepare the following items:[107]

- A properly completed, legible and signed original Claim Form;
- 3 photocopies of the above original Claim Form;[108]
- 1 photocopy each of any other supporting documents;[109]
- If the Respondent is a corporation, an original copy of the latest Instant Information search [Business Profile] of the Respondent[110] should be obtained no earlier than 1 month from the date of filing of the Claim; and
- A photocopy of the plaintiff's identification document or if a practitioner is filing on behalf of the plaintiff, then additionally a photocopy of their identification document.

3.52. If a document is in a language other than English, a certified translation of the document must also be provided. A date will be fixed for the attendance of parties at consultation within 10 to 14 days upon registration.[111]

3.53. After a claim is filed, the SCT will require the parties to first attend a consultation where a Registrar or Assistant Registrar of the SCT will attempt to mediate a settlement.[112] Further consultations can be set at the Registrar's or Assistant Registrar's discretion.[113]

3.54. If no settlement can be reached, a hearing date will be given for the parties to attend a hearing before a Referee.[114] The hearing will generally be set for within

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[106] If lodging a claim through fax, the current fax numbers at time of printing are +65 6536-4478 or +65 6435-5994.

[107] The State Courts of Singapore, *Civil Justice Division, Small Claims Tribunal*, *Processes & Procedure, Lodging a Claim,* online: The State Courts of Singapore <https://app.statecourts.gov.sg>. [SCT, Lodging a Claim]

[108] If the client had indicated in the Summary of their Claim Form that they are referring to any attached document, photocopies of such attached documents should be made as well. Please note that a set of the Claim Form and attached documents referred to in "Summary of the said Claim Form" will be forwarded to the other party by the SCT Tribunals.

[109] If the client is faxing the documents and the total number of pages of such supporting documents exceed three pages, do not fax the supporting documents. Instead, bring the original(s) and one photocopy, and hand it to the Registrar or Assistant Registrar hearing the Consultation.

[110] The Instant Information search [Business Profile] can be purchased from the self-service e-kiosk located within the Tribunals' waiting area. Alternatively, the Instant Information search [Business Profile] can be purchased online at the Accounting and Corporate Regulatory Authority's (ACRA) BizFile website <www.bizfile.gov.sg> (> Purchase of Information > Instant Information > Business Profile) or at any ACRA-accredited service providers. The nearest service provider is Crimsonlogic Pte Ltd <http://www.crimsonlogic.com.sg>.

[111] SCT will serve the claim on the Respondent by post. Alternatively, the client can also serve the court papers personally to the Respondent. When doing this, a written statement of such service at the Consultation should be provided.

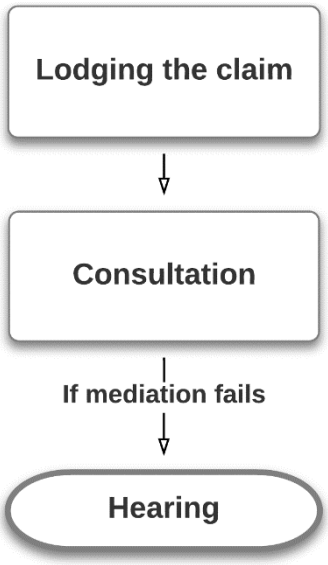
[112] Small Claims Tribunal, "General Reference BOOKLET [*sic*]" at 8, online: The State Courts of Singapore <https://app.statecourts.gov.sg>. [General Reference Booklet]

[113] *Ibid* at 9.

[114] *Ibid* at 10.

7 to 10 days of the consultation.[115] The parties may still attempt to resolve the matter between themselves before the consultation date. Should they reach a settlement, and if the client wishes to withdraw the claim,[116] the client must write to the SCT and withdraw the claim. Parties should also inform the SCT, in writing, about the settlement.[117]

Chart 5: Process of bringing a claim to the SCT



iii. Legal costs involved

3.55. By choosing to make their legal claims heard, clients will be subject to a range of costs that they often cannot afford. Costs are defined as including fees, charges, disbursements, expenses and remunerations.[118] This deters them from seeking legal aid and many migrant workers choose instead to simply return home.[119] This also reduces the effectiveness of seeking legal aid where the

[115] For more information see The State Courts of Singapore, "Civil Justice Division: Small Claims Tribunal- A General Overview of Filing a Claim at the Small Claims Tribunals", online: The State Courts of Singapore <https://app.statecourts.gov.sg/sct/>.

[116] General Reference Booklet, s*upra* note 112 at 11.

[117] SCT, Lodging a Claim, *supra* note 107.

[118] *Rules of Court,* o 59 r (1), *supra* note 15, see Section 6.X for the text of the law; Cost issues in litigation is explained as:

A successful party would ordinarily be entitled to claim costs from his opponent (i.e. party and party costs); and both parties wold have to pay the bills of their respective lawyers (i.e. solicitor and client costs). See Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at Chapter 26.

[119] Based on extensive field research, many migrant workers choose to return home with only a fraction of the total amount owed to them. Some may even leave without any compensation at all.

client is burdened by costs that put them in even greater debt after trial.[120] Thus, it is the job of the practitioner or lawyer to minimise the costs their client incurs.

iv. Ineligibility for legal aid

3.56. Migrant workers are not eligible for legal aid in civil claims, as this form of legal aid is only available to Singapore citizens and Permanent Residents in Singapore.[121] Without the pro bono services of a lawyer, migrant workers will typically not have the funds to hire a lawyer to mount a claim.[122]

v. Fees payable to the District Court or Magistrate's Court

3.57. Court fees are prescribed in a number of statutory regulations and are payable at various stages in civil proceedings. Fees are separately payable in respect of services, such as sealing documents, providing copies of documents and the use of the court for hearings.[123] Court hearing fees are usually paid at the time the matter is set down for hearing, i.e. when the parties are ready for the hearing.[124] These fees are usually paid by the plaintiff or the party who applies for the hearing date.[125]

3.58. Courts in Singapore follow the principle that "costs follow the event," meaning that the costs of an action are usually awarded to the successful litigant.[126] This is a huge disincentive for migrant workers to commence civil claims as they may be unwilling to take the risk of losing the case and ending up further in debt. On average, costs can reportedly amount to at least $1,000.[127]

vi. Fees payable to the Small Claims Tribunal

3.59. The plaintiff must pay a lodgement fee to lodge or file a claim at the Tribunals.[128]

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[120] Fordyce, "Widespread but unnecessary reliance on lawyers" (14 July 2013), online: TWC2 < http://twc2.org.sg>.

[121] Legal Aid Bureau, *Eligibility,* "Do I qualify for legal aid?", online: Legal Aid Bureau <http://www.lab.gov.sg>.

[122] It is difficult for a migrant worker to appear as a litigant-in-person, especially due to language barriers and lack of familiarity with their legal rights.

[123] Supreme Court of Singapore, "Civil Proceedings: Commencement of an Action - Court Fees and Hearing Fees", online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/> [Civil Proceedings, Court Fees and Hearing Fees].

[124] *Ibid.*

[125] *Ibid.*

[126] Pinsler, "Legal Procedure (Civil)", *supra* note 96, at 8.

[127] Interview with June Lim, Senior Associate, Fortis Law Corporation and other lawyers.

[128] The State Courts of Singapore, *Civil Justice Division, Small Claims Tribunal*, *Filing Fees,* online: The State Courts of Singapore <https://app.statecourts.gov.sg>.

Table 2: Fees payable to the SCT[129]

	Not exceeding $5,000	**Exceeding $5,000 but not exceeding $10,000**	**Exceeding $10,000 but not exceeding $20,000**
Consumer claim	$10	$20	1% of claim amount
Non-consumer claims (e.g. claims against employment agencies)	$50	$100	3% of claim amount

3.60. If the client has applied for an SCT claim via fax, payment must be made within seven days from the date of acknowledgment, failing which the claim will be deemed to have been withdrawn.[130]

vii. Time Bars

3.61. Claims made in tort or contract law are subject to a time bar of **six years** from the date on which the cause of action occurred.[131]

[129] SCT, Lodging a Claim, *supra* note 107.

[130] *Ibid*.

[131] *Limitations Act* (Cap 163, 1996 Rev Ed Sing), s 6(1)(a) [*Limitations Act*].

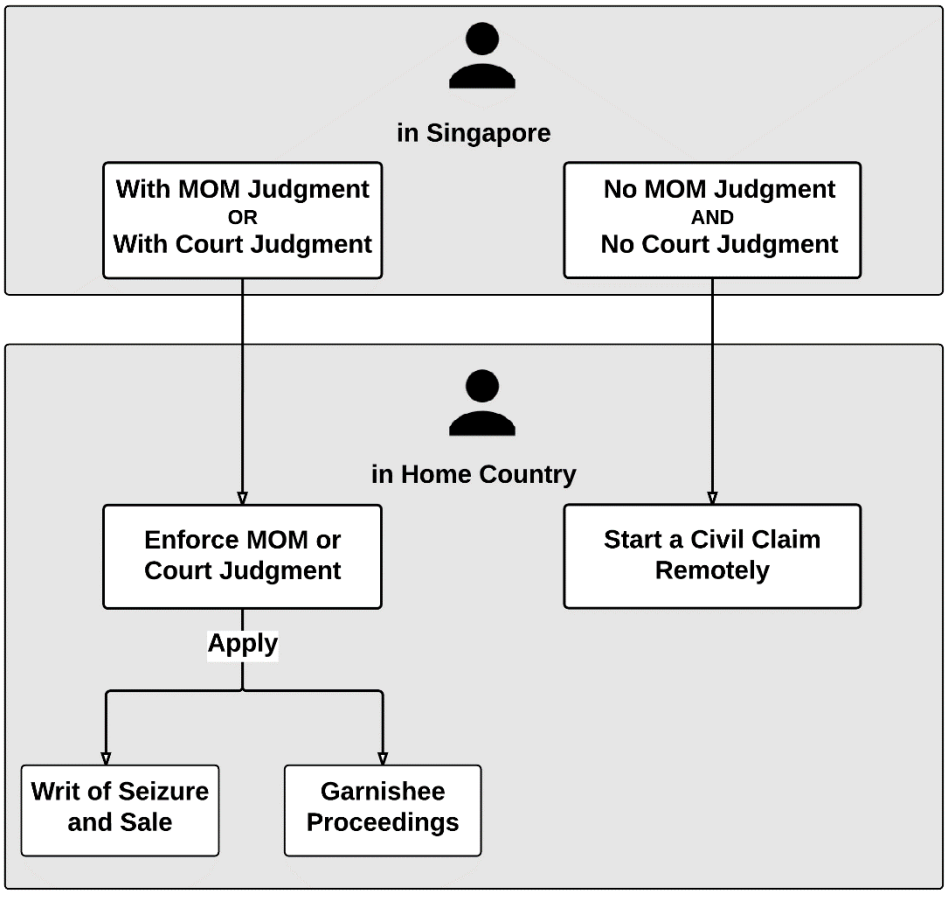
4. LEGAL OPTIONS AVAILABLE TO MIGRANT WORKERS IN THEIR HOME COUNTRY

I. Introduction

4.1. Many migrant workers go home before they are able to bring their claims to MOM or raise a civil claim in Singapore. In the event that the client has to return home after completing the process of making a claim through the MOM route, they can still carry out the process of enforcing MOM judgments from their home country. To enforce an MOM judgment, the client can apply for a Writ of Seizure and Sale (WSS) or a Garnishee Proceeding. This is elaborated in Section II below.

4.2. For those who have not brought claims or obtained a judgment via the MOM route, they may attempt to raise a civil claim remotely from their home country. The process for doing so will be explored in Section III below.

Chart 6: Overview of the legal routes available to a migrant worker pursuing a claim or enforcing a judgment from abroad



II. Enforcing a judgment from either the Minister of Manpower (MOM) or the civil court when the client is abroad

4.3. After obtaining a Judgment or Order for the payment of money (e.g. payment of wages), the client may apply to enforce the judgment by a Garnishee proceeding or a Writ of Seizure and Sale (WSS).[132] Parts B and C will explain the process of applying for a Garnishee proceeding and a WSS. If the client is in Singapore, the client and their practitioner may simply follow the steps laid out below. If the client is already in their home country, the client may give his lawyer a Power of Attorney (POA), which would be explained in Part D, in order for a practitioner to execute a Garnishee order or WSS on the client's behalf. Part E then briefly touches on the possibility of utilising a "soft" law approach through MOM.

A. A few preliminary notes

i. A note about finality of judgments from the Ministry of Manpower

4.4. First, it is paramount to determine whether the MOM judgment can be open to challenge by the employer, which would hinder or delay enforcement of the judgment by the migrant worker. An MOM judgment can be appealed to the High Court,[133] although it is subject to certain time bars. Regarding EA Claims, any person dissatisfied with an MOM judgment may "within 14 days after the decision or order, appeal to the High Court[134] from the decision or order."[135] Similarly for WICA claims, a party may "appeal to the High Court whose decision shall be final."[136] However, not all judgments can be appealed: "no appeal shall lie against any order unless a substantial question of law is involved in the appeal and the amount in dispute is not less than $1,000."[137]

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[132] *Rules of Court*, *supra* note 15, o 45 r 1. See Section 6.X. for the text of the law.

[133] *Rules of Court*, *supra* note 15, o 55. See Section 6.X. for the text of the law.

[134] The High Court hears both criminal and civil cases as a court of first instance. The High Court also hears appeals from the decisions of District Courts and Magistrate's Courts in civil and criminal cases, and decides points of law reserved in special cases submitted by a District Court or a Magistrate's Court. In addition, the High Court has general supervisory and revisionary jurisdiction over all subordinate courts in any civil or criminal matter. Supreme Court of Singapore, "About Us: Our Courts", online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/>.

[135] *EA*, *supra* note 2, s 117(1); However, based on extensive field research, it is noted that 14 days does not seem to be a hard deadline requiring strict adherence to in practice. See Section 6.V. for the text of the law.

[136] *WICA*, *supra* note 2, s 29(1). See Section 6.XIII. for the text of the law.

[137] *Ibid,* s 29(2A); The requirement of a *substantial* question of law means that it is "not enough for there to be a mere question of law or that the Court takes the view that a different interpretation of the facts could have been drawn" (Kee Yau Chong v S H Interdeco Pte Ltd [2014] 1 SLR 189). " In *Pang Chew Kim v Wartsila Singapore Pte Ltd* [2012] 1 SLR 15 [*Pang Chew Kim*] at [19], Tay Yong Kwang J noted that the following range of errors of law are relevant for an appeal under s 29(2A): "... misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty

ii. A note about time bars

4.5. There are no time bars to the use of Garnishee proceedings or WSS.[138] However, the passage of time allows unscrupulous employers to liquidate their company's assets or declare bankruptcy. The former leaves the plaintiff with little recourse for obtaining the judgment, while the bankruptcy process may enable other creditors to obtain their payment prior to the plaintiff, potentially leaving the company empty of assets by the time the plaintiff's claim gains priority.

B. Garnishee proceedings

4.6. If the client has obtained a judgment from MOM, such as a judgment that the employer has to pay unpaid wages owed to the client, but the employer fails to pay, the client may apply for a garnishee order from the District Courts or Magistrates' Courts.[139]

i. What is a garnishee proceeding?

4.7. A "garnishee order absolute" is a court order directed at a garnishee (usually a third party who holds some of the debtor's assets or a bank) requiring them to release to the client, i.e. the Judgment Creditor, any moneys which the employer, i.e. the Judgment Debtor, owes them.[140]

4.8. Here is a hypothetical illustration:

Muneeb is a migrant worker from India. Muneeb's employer, Mr Wang, fails to pay Muneeb his salary, despite a judgment from MOM through the Labour Court ordering him to do so. Muneeb can begin a suit against Mr Wang to

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legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof." But see *Pang Chew Kim* at [20]; conversely, findings of fact are appealable only if they are findings that "*no* person acting judicially and properly instructed as to the relevant law could have come to the determination upon appeal". See Section 6.XIII for the text of the law.

[138] While *Limitation Act*, *supra* note 131, s 6(3) provides time limits for actions to enforce judgments, *Desert Palace Inc v Poh Soon Kiat* [2009] SGCA 60 [*Desert Palace*] clarifies that s 6(3) should be interpreted restrictively "to exclude a writ of execution on a judgment and all other modes of enforcement like Garnishee proceedings…for which the [Limitation Act] does not prescribe any time bar". In this regard, the court noted that a distinction has been drawn in case law between an "action" upon a judgment and an "execution" of a judgment, and further highlighted policy reasons supporting such a distinction. See Section 6.IX for the text of the law.

[138] Nevertheless, with regards to a WSS, pursuant to *Rules of Court*, *supra* note 15, o 46 r 2, a WSS to enforce a judgment or order may not be issued without the leave of Court where "6 years or more have lapsed since the date of the judgment or order". Rather than categorizing this as a time bar, the court in *Desert Palace*, *ibid*, viewed the requirement for leave as "more a procedural and monitoring measure than a substantive mandatory measure to extinguish execution on a judgment the moment six years or more has elapsed". See Section 6.X for the text of the law.

[139] *Rules of Court*, *supra* note 15, o 45 r 1. See Section 6.X for the text of the law.

[140] The Subordinate Courts of Singapore, *Garnishee Proceedings* (1999) at 1, online: LawNet <http://lwb.lawnet.com.sg/legal/lgl/html/freeaccess/scpp/Garnishee.pdf> [Subordinate Courts, *Garnishee Proceedings*].

obtain the funds. Muneeb goes to court and obtains a garnishee order to attach the funds that Mr Wang has on deposit at a bank. In this scenario, Muneeb is the judgment creditor, as Mr Wang owes him money, and Mr Wang is the judgment debtor, as he owes Muneeb money, and the bank is the Garnishee, meaning the bank will be required to give Mr Wang's funds to Muneeb.[141]

ii. Application process

4.9. A garnishee order is not enforceable unless it is made absolute, i.e. complete. To make a garnishee order absolute, two main components must be fulfilled:

1) First, the Judgment Creditor must apply for the Garnishee order, which may be filed as an ex parte (i.e. with only one of the parties appearing in court) Summons in Chamber[142] supported by an affidavit;[143] and
2) Second, the garnishee order must be served on the garnishee and Judgment Debtor personally at least seven days before the return date.[144]

4.10. If the garnishee does not dispute the order,[145] then the garnishee order will be made absolute.[146]

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[141] Raffles Group Law Practice, "Someone owes you money", online: Raffles Group Law Practice <http://www.singaporelawraffles.com/>.

[142] The ex parte Summons in Chambers includes:

A request that a return date for all interested parties be set to attend before the court.

A request that a statement all debts due or accruing due from the garnishee to the judgment debtor be attached.

A statement that the sum attached be limited to a certain fixed amount. This particular sum usually consists of the amount of the judgment, post judgment interest and the costs of the garnishee application itself. See Subordinate Courts, Garnishee Proceedings, *supra* note 131.

[143] The affidavit includes:

Identifying the judgment to be enforced.

Stating the amount remaining unpaid.

Stating that to the best of the information or belief of the client, the garnishee is within the jurisdiction and is indebted to the judgment debtor. The sources of information or the grounds of belief should then be stated. *Ibid.*

[144] This would be set in the ex parte Summons in Chamber. *Ibid.*

[145] There are three situations where the Garnishee order can be disputed:

1. If there is no money held by the garnishee:

The judgment creditor must attend and ask for the order to be discharged.

2. In the situation that the Garnishee objects to an order:

In this situation, the court can summarily decide the issue. If there is an issue of fact, the court has the discretion to order that the issue be sent for trial, either before a Judge or the Registrar. The court will provide all necessary directions for the trial including setting out the issues to be tried. The directions will usually conform to Form 101 of the Rules, with the necessary modifications. If there is conflicting evidence in the affidavits given by the garnishee and the judgment creditor, then the matter will be sent for trial and will not be decided summarily.

3. Where there are claims of Third Persons:

The onus is on the garnishee to inform the court of any claim or lien over the moneys which is known to him. If there is any such claim by a third person over the debt sought to be garnished, the court can order that the person attends

4.11. Once the garnishee order has been granted, a draft order of court should be prepared and submitted to Summons in Chamber court.[147] Upon acceptance of the draft, counsel for the judgment creditor should file two copies of the final order.[148] Then, a return date for the hearing of the garnishee order absolute application will be stated in the order. Currently, the court schedules the hearing date approximately four weeks from the granting of the garnishee order.[149]

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court and dispose of the issue summarily, or deal with it in a similar way for cases where the garnishee objects to the order absolute being made. *Ibid.*

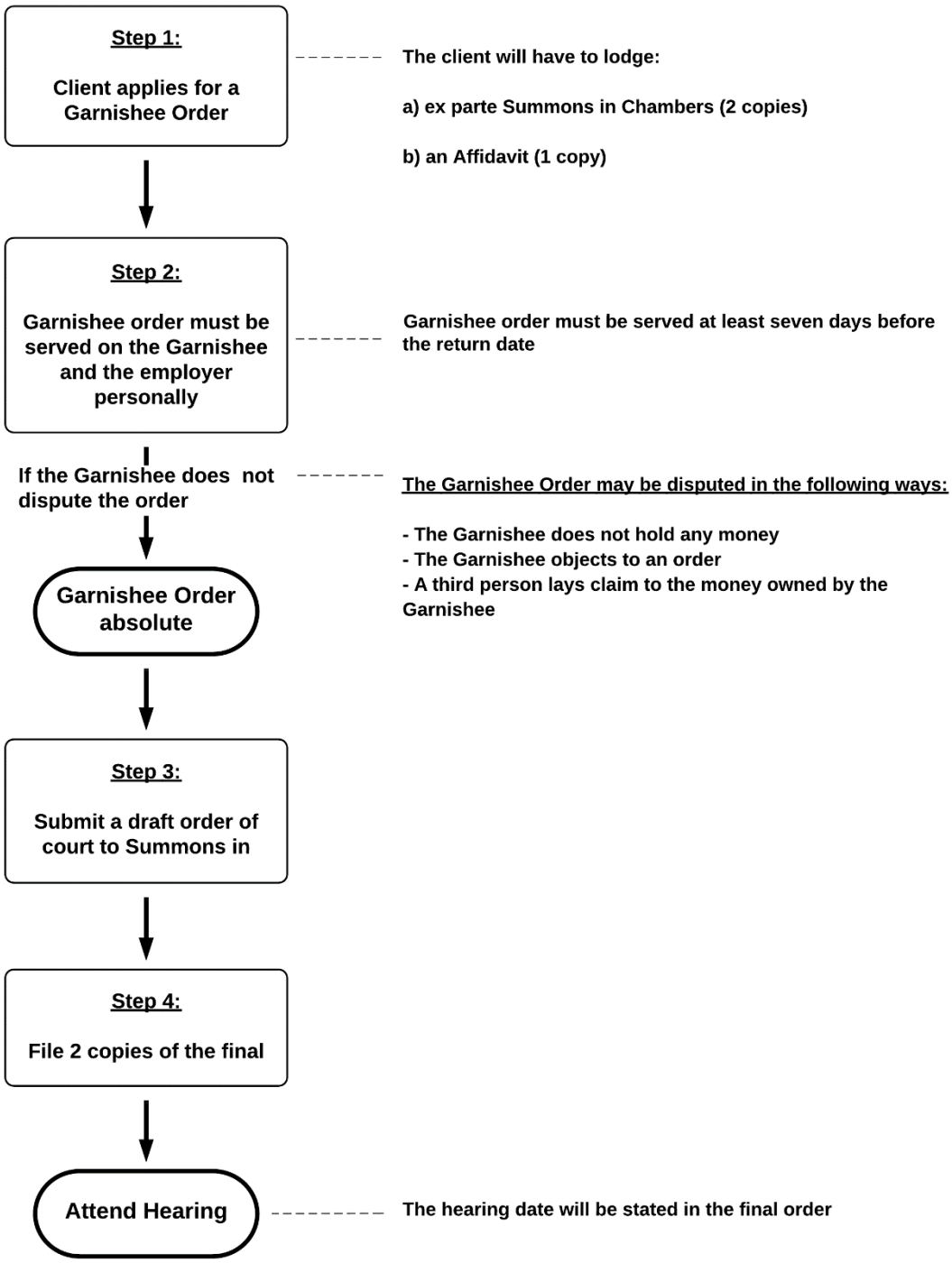
[146] *Rules of Court*, *supra* note 15, o 49. See Section 6.X. for the text of the law.

[147] Subordinate Courts, *Garnishee Proceedings*, *supra* note 131.

[148] *Ibid.*

[149] *Ibid.*

Chart 7: Process of applying for a garnishee order



4.12. Note that when the client is not in Singapore, they must produce a certificate from the Monetary Authority of Singapore granting permission [150] for the

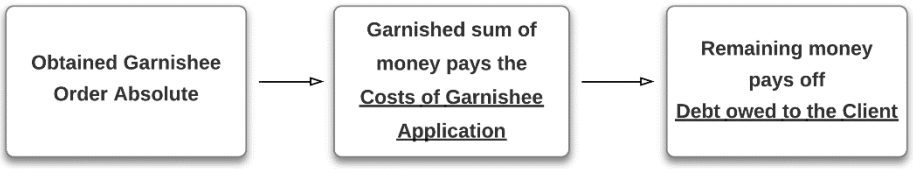
[150] *Exchange Control Act* (Cap 99, 2000 Rev Ed Sing).

payment, either unconditionally or on conditions which have been complied with.[151]

iii. Costs for the garnishee application

4.13. Where an order absolute is made, the Rules prescribe the amount of costs that should be awarded.[152] Only after paying the costs due to the judgment creditor and to the garnishee would the garnished amount be used to extinguish the judgment debt.[153] This means that the garnished sum of money would first be used to pay the costs of the garnishee application before it can be used to compensate the client for the sum owed by the other party.

Chart 8: Costs of garnishee application and paying off debt owed to the migrant worker



4.14. In all other situations, court costs will be at the discretion of the court. Where there is no debt due or accruing due from the garnishee, the order nisi, i.e. order made absolute based on fulfilling certain conditions, is usually discharged with no order as to costs.[154] Thus, the client will have to bear the cost of the garnishee application. However, the discretion with regards to costs is broad. The court may order the judgment debtor to bear the costs of the garnishee proceedings if it deems it appropriate.

4.15. Below is a continuation of the previous hypothetical in 4.16 for illustration:

Mr Wang owes $3,000 of unpaid salary to Muneeb. When Muneeb has obtained a garnishee order, money will be obtained from the Garnishee (in this case the bank). However, the bank has only $2,500 owed to Mr Wang. The $2,500 will first be used to pay the costs of applying for the garnishee order. After settling those costs, the remaining money can be used to pay down the debt that Mr Wang owed Muneeb. Note that incomplete fulfilment of the debt does not cancel the remaining debt. Here, Muneeb may attempt to pursue other methods of recovering the remaining debt.

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[151] *Rules of Court*, *supra* note 15, o47 r 7. See Section 6.X. for the text of the law.

[152] *Rules of Court*, supra note 15, o 59, Appendix 2, Part III, item 4. See Section 6.X. for the text of the law.

[153] *Rules of Court*, supra note 15, o 49 r 10, o 59, Appendix 2, Part III, item 4(a)). See Section 6.X. for the text of the law.

[154] Subordinate Courts, *Garnishee Proceedings*, *supra* note 131.

iv. Limits of a garnishee proceeding

4.16. There are a few limits to pursuing a garnishee proceeding:

- As long as the garnishee is not within the jurisdiction, no garnishee order is possible;[155]
- Current law exempts the wages or salary of a judgment debtor from being garnished;[156] and
- A garnishee proceeding does not guarantee that the client will be fully compensated. As illustrated in the above hypothetical, if the amount that the garnishee owes the judgment debtor is less than what the judgment debtor owes the judgment creditor, the garnishee order may be fulfilled without fully paying off the debt owed.

C. Writ of Seizure and Sale (WSS)

4.17. Another way to enforce a judgment obtained from MOM is to obtain a Writ of Seizure and Sale (WSS).[157]

i. What is a Writ of Seizure and Sale (WSS)?

4.18. A WSS is a court order authorising a bailiff (an officer of the court), to seize the moveable property[158] belonging to the judgment debtor.[159] In this context, the debtor is generally the client's employer. Thereafter, the bailiff arranges an auction sale of the seized property and the proceeds of sale will be used to satisfy the judgment debt (after deducting the execution costs and the bailiff's expenses).[160]

ii. Application process[161]

4.19. **Step 1:** If the client has a lawyer, the lawyer must complete electronic template forms online through eLitigation (assuming the lawyer is subscribed to

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[155] *Rules of Court*, *supra* note 15, o 49 r 1(1). See Section 6.X. for the text of the law.

[156] *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing), s 13(c). *See also* Susan Leong, "Attachment of Salaries and Wages in Singapore — Recent Developments" (2004), online: Law Gazette <http://www.lawgazette.com.sg/2004-4/April04-feature.htm>; Pinsler, "Section 13 of theSupreme Court of Judicature Act and Enforcement against the Judgment Debtor's Earnings" (2004)16 SAcLJ 27; *American Express Bank Ltd v Abdul Manaff bin Ahmad* [2003] 4 SLR 780.

[157] *Rules of Court*, *supra* note 15, o 45 r 1. See Section 6.X. for the text of the law.

[158] As an example of property belonging to the judgment creditor: If the employer of the client owns a restaurant, then the tables, chairs, dishes, and even the building itself can be seized by the bailiff and then auctioned.

[159] The bailiffs are empowered under the *State Courts Act* (Cap 321, 2007 Rev Ed Sing), s 15 & s 16 to handle the enforcement proceedings. The bailiffs may, under the authority given to them under the *State Courts Act*, s 16 enter the house of the judgment debtor or premises of a third party to execute and carry into effect all Writs of Execution and Court Orders. The State Courts of Singapore, "Civil Justice Division- Baliffs Section", online: The State Courts of Singapore <https://app.statecourts.gov.sg/> [Civil Justice Division - Bailiff's Section].

[160] *Ibid.*

[161] *Rules of Court*, *supra* note 15, o 47. See Section 6.X. for the text of the law.

eLitigation[162]). This can be accomplished by the lawyer alone if the client is not in Singapore. If the client does not have a lawyer, or the lawyer is not subscribed to eLitigation, they may also complete the hardcopy forms, which are available at the Service Bureau.[163]

4.20. **Step 2:** The Bailiff, an officer of the court, will inform the claimant, i.e. the client, by way of an Appointment Letter by post or fax (if a fax number is furnished) of the date fixed for execution.[164] If the client, his lawyer, or the client's donee who holds the POA does not receive an Appointment Letter from the Bailiffs Section within three weeks after submitting or filing the documents, they can contact the Bailiffs' Section.[165]

4.21. **Step 3:** The claimant, i.e. the client may authorise a representative to attend on their behalf through a POA if they are unable to be present on the appointed date (e.g. if they have returned to their home country).[166]

4.22. The claimant or the authorised representative must provide the Bailiff assigned to the case (as indicated in the Appointment Letter):

- The Appointment Letter (issued by the Bailiff);
- The official receipt to confirm that deposit of $300 or such amount as requested by the Bailiff, has been paid at the Finance Section of the State Courts; and
- A letter of authorisation and indemnity duly signed by the claimant.
- Note that if the claimant or their representative are absent on the appointed seizure date, they will have to re-apply for a fresh seizure date.[167]

[162] For a step-by-step guide to completing the forms electronically, see "Writ of Seizure and Sale", online: eLitigation <https://www.elitigation.sg/getready/writ.html>.

[163] eLitigation, "About Service Bureau", online: eLitigation <https://www.elitigation.sgl>

[164] *Rules of Court*, *supra* note 15, o 47. See Section 6.X for the text of the law.

[165] State Courts Bailiff Section, telephone no. +65 64355871.

[166] *Rules of Court*, *supra* note 15, o 47. See Section 6.X for the text of the law.

[167] *Ibid.*

iii. Costs

4.23. The usual costs incurred in the WSS process are reflected in the table below.

Table 3: Costs of a WSS process:[168]

Documents	District Court	Magistrates' Court	Small Claims Tribunal
WSS	$270.00	$155.00	$60.00
Undertaking, Declaration and Indemnity	$10.00	$10.00	$10.00
Order of Tribunal	-	-	$10.00
Total:	$280.00	$165.00	$80.00

4.24. Note that the above fees do not include eLitigation electronic filing and manual handling fees. Also, no refunds are allowed should the worker decide to discontinue the WSS.[169] Should the court find any administrative errors/clerical errors, rejection fees will be charged.

4.25. **Additional** costs incurred in the WSS process include: [170]

- Bailiff's attendance fee of $50.00 per hour or part thereof will be levied when attending to the WSS;
- Items belonging to the judgment debtor will be assessed a Court commission once seized. The minimum amount of commission is $50;
- An additional Court commission will be charged upon sale of the seized property. The minimum amount of commission is $100;
- If the estimated value of the seized items is $2,000 or below, the auctioneer's fee will be at least $150. If the estimated value of the seized items is above $2,000, the auctioneer's fee will be at least $800;
- Locksmith charges; and
- Valuation charges.

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[168] The State Courts of Singapore, "Civil Justice Division: Processes & Procedures- Enforcement of Judgments or Orders by Writ of Seizure and Sale", online: The State Courts of Singapore <https://app.statecourts.gov.sg/> [State Courts of Singapore, "Enforcing Judgments or Orders by WSS"].

[169] See Civil Justice Division, *Processes & Procedures: Enforcement of Judgment or Orders by Writ of Seizure and Sale,* online: <https://app.statecourts.gov.sg>.

[170] *Ibid*.

4.26. Note that the expenses may be recovered from the debtor if the execution is successful and the proceeds of sale are sufficient to cover the judgment debt and the expenses incurred.[171] If the auction sale proceeds are insufficient to cover the Bailiff's execution expenses, the balance outstanding expenses will be deducted from the creditor's deposit.

iv. Limits of a Writ of Seizure and Sale (WSS)

4.27. The high costs of applying for a WSS deters many migrant workers who are already facing financial hardship. While they may recover these expenses through the execution of the writ, obtaining the funds to begin WSS proceedings can be challenging.

4.28. **Note there is no guarantee that a WSS can be successfully executed**.[172] Enforcing a writ may become impossible if the company lacks sufficient assets (for instance when a company is bankrupt or in financial difficulty). Unfortunately, unscrupulous and unethical companies may shift their assets in a bid to avoid paying the workers or any judgments entered against them. In the end, the worker may end up returning home empty handed, or with just a fraction of what is owed to them, despite having acquired a court order and spending so much in the process in the hope that the employer would "pay up" to avoid the auctioning of assets.[173]

v. When the company is bankrupt

4.29. When the client makes a claim **after** the company is declared bankrupt, the client can no longer pursue any legal claim in order to recover funds owed prior to bankruptcy.[174]

4.30. When the client makes a claim **before** the company is declared bankrupt, the client should submit a Proof of Debt form. This can be done electronically[175] for $5.[176]

D. Power of Attorney (POA)

4.31. A Power of Attorney (POA) is an "instrument created by a person who entrusts someone to act on his behalf."[177] The person who creates the POA, in this case

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[171] *Ibid.*

[172] State Courts of Singapore, "Enforcing Judgments or Orders by WSS", *supra* note 168.

[173] H.O.M.E. & TWC2, Justice Delayed, Justice Denied, *supra* note 18 at 15.

[174] Bankruptcy Act (Cap 20, 2009 Rev Ed Sing), s 76(1)(c)(ii). See Section 6.II for the text of the law.

[175] See Insolvency & Public Trustee's Office, online: IPTO online portal <http://www.iptoonline.gov.sg> to submit forms electronically.

[176] Ministry of Law, "Information for Creditors", online: Insolvency & Public Trustee's Office <https://www.mlaw.gov.sg/content/ipto/en/bankruptcy-and-debt-repayment-scheme/bankruptcy/information-for-creditors.html>.

[177] Supreme Court of Singapore, "Civil Proceedings: Other Civil Proceedings and Processes- Power of Attorney", online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/>.

the client, is called the "donor," and the person who receives the authority to act on behalf of the donor is called the "done."[178] The creation of a POA[179] may be deposited with the Supreme Court.[180]

4.32. A POA can give the client's lawyer a range of powers, from the ability to make minor decisions to making all decisions relevant to the case. It is important for the lawyer to discuss with their client the range of powers that they wish to give their lawyer before the client makes a decision.

E. "Soft" Law Approaches of the Ministry of Manpower - blacklisting the employer

4.33. MOM has the power to debar (commonly referred to as "blacklisting") employers in cases of legal violations.[181] Companies who are debarred "will not be allowed to apply work passes for new foreign workers, as well as renew the work passes of their existing foreign workers."[182] This can impact the company's operations, and such a soft law approach may be effective in inducing compliance by the employer. While debarment does not result in compensation, a threat of approaching MOM about a debarment may be a useful negotiating tool in an attempt to obtain a favourable settlement from the employer.

4.34. One successful case where compliance was induced is the case of Ms Leng:[183]

4.35. Ms Leng, an officer in the tourism industry, was owed salary arrears by her former employer, and she obtained a Labour Court order for payment. The former employer was recalcitrant, but when MOM placed the company and its directors under debarment, they "finally realised the seriousness of not complying with the Labour order, and the company quickly settled Ms Leng's payments in full".

III. Starting a civil claim on behalf of clients abroad

4.36. Clients who have already left Singapore for their home country may still potentially present evidence, and allowing a case to be brought in Singapore courts with the aid of a Singapore-based lawyer. A client may choose to travel to Singapore, or alternatively, they may present evidence through other avenues such as deposition and video conferencing.

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[178] *Ibid.*

[179] *Conveyancing and Law of Property Act* (Cap 61, 1994 Rev Ed Sing), s 48. See Section 6.III. for the text of the law.

[180] *Rules of Court*, *supra* note 15, o 60 r 6. See Section 6.X. for the text of the law.

[181]Ministry of Manpower, "Work Permit- before you apply", online: Ministy of Manpower <http://www.mom.gov.sg/foreign-manpower/passes-visas/work-permit-fw/before-you-apply/Pages/blacklisting.aspx>.

[182] *Ibid.*

[183] See e.g. Anna Yap, "When The Going Gets Tough", *Challenge* (July-August 2009) 5, online: Challenge <http://issuu.com/challengeonline/docs/challenge-200907-mag>.

A. Choice of courts

4.37. Legal practitioners can bring their client's claims to the District Court or the Magistrates' Court, depending on the amount in dispute, i.e. the amount which the client is trying to claim.[184]

B. Appearing in Singapore courts – ways of presenting evidence

4.38. The Rules of Court prescribe dire consequences for parties who do not appear for certain court hearings.[185] Judges may commence the trial without the party, make a summary judgment, or dismiss the claim.[186] However, "appearance" need not always mean an appearance in person.

i. Physical appearance from abroad

4.39. Clients almost always can choose to travel to Singapore. While they must pay costs of travel up front, recent case law suggests that they may claim back at least some of these expenses should they win.[187] Such expenses include the cost of travel even within their home country (e.g. when the worker lives in a place that is distant from the main city with the airport).[188] Under existing case law,[189] costs are at the discretion of the court[190] based on the principle of reasonableness.[191] This principle is broad and requires claimants to show that the costs incurred were reasonable and necessary, and that the costs were "proportionately incurred"[192] in the "entire context of that matter."[193]

ii. Presentation of affidavits

4.40. With regards to affidavits, the general rule is that at "a trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of

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[184] See *supra* note 19.

[185] *Rules of Court*, *supra* note 15, o 35 r 1. See Section 6.X. for the text of the law.

[186] See *Lin Tsang Kit and Another v Chng Thiam Kwee* [2005] SGHC 10 where the second plaintiff's claim was dismissed because he did not appear to testify at trial. See Section 6.X. for the text of the law.

[187] See *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] SGCA 3 [*Lam Hwa Engineering*]. See Section 6.X. for the text of the law.

[188] *Ibid*, where land transport expenses of $95 incurred in China to travel to and from the airport were recoverable.

[189] *Ibid*.

[190] *Rules of Court*, *supra* note 15, o 59 r 1(1); "in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid." See Section 6.X. for the text of the law.

[191] *Rules of Court*, *supra* note 15, o 59 r 27(2); "there shall be allowed a reasonable amount in respect of all costs reasonably incurred". See Section 6.X for the text of the law.

[192] *Lam Hwa Engineering, supra* note 187 at [21] and *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 [*Lin Jian Wei*] at [78]. See Section 6.X. for a summary of the case.

[193] *Lin Jian Wei, ibid,* at [56]. See Section 6.X. for a summary of the case.

affidavit."[194] Unless the opposing party and the court agree to admit evidence without need for cross-examination, affidavits of evidence-in-chief by an absent witness are disallowed except with the leave of the court.[195]

iii. Video Conferencing

4.41. If the client cannot be physically present in Singapore for court hearings, they may also apply to appear via video conferencing.[196]

1) Video-conferencing fees

4.42. The costs of using a video-conferencing facility to present testimony may be prohibitive for most migrant workers. The client must pay the fees for using the technology court and its video conferencing facilities in both their home country and in Singapore.

4.43. The fees payable in Singapore are reflected in the table below.

Table 4: Costs of video-conferencing [197]

Booking the technology court:	$50 per day
Booking the technology court's video conferencing facility:	$1,000 per day

4.44. In addition, the client must also pay any other video-conferencing the fees incurred in the country where the witness is physically present (for example, they have to pay for the costs of conducting video conferencing from the location.)

4.45. It remains to be seen whether successful claimants will be entitled to costs for video-conferencing facilities.

2) Conditions to allow video conferencing

4.46. As a general principle, witness testimony is to be given in person and in open court,[198] and is "subject to these Rules and the Evidence Act, and any other written law relating to evidence".[199] However, the Evidence Act provides that "a person, may with leave of the court, give evidence through a live video or live

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[194] *Rules of Court*, *supra* note 15, o 38 r 2(1). See Section 6.X. for the text of the law.

[195] *Rules of Court*, *supra* note 15, o 38 r 2(1). See Section 6.X. for the text of the law.

[196] See *Evidence Act* (Cap 97, 1997 Rev Ed Sing), s 62A(1) [*Evidence Act*]. See Section 6.VII for the text of the law.

[197] See Supreme Court of Singapore, "Technology Courts Booking", online: Supreme Court of Singapore <http://app.supremecourt.gov.sg/default.aspx?pgid=57>.

[198] *Sonica Industries v Fu Yu Manufacturing Ltd* [1999] SGCA 63 [*Sonica*] at [8]. See Section 6.VII for the text of the law.

[199] *Rules of Court*, *supra* note 15, o 38 r 1. See Section 6.II. for a summary of the case.

television link in any proceeding, other than proceedings in a criminal matter".[200] The legal issue is whether a migrant worker may with leave of court, give evidence through video-conferencing, obviating the need for physical presence in Singapore.

4.47. The Singapore court has outlined three stages of inquiry for whether to allow appearance by video conferencing.[201]

4.48. **Stage 1:** First, application for leave must fall under one of four threshold grounds. Relevant to migrant workers who have returned to their home country, one threshold ground allows video conferencing when the witness is outside of Singapore.[202]

4.49. **Stage 2:** The court must then consider whether leave should be granted, taking into account the following three factors: [203]

1) The reasons for the witness being unable to give evidence in Singapore;
2) The administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
3) Whether any party to the proceedings would be unfairly prejudiced.

4.50. These factors are non-exhaustive. Other factors that have been considered by Singapore courts include:

- **The materiality of the evidence at hand:** where the evidence is peripheral to the main issues at trial, an order approving video-conferencing would not normally be justified.[204]
- **The "security and confidentiality of the proceedings:**" where the court is uncertain of the security and confidentiality of the proceedings

[200] *Evidence Act*, *supra* note 196, where allowing video conferencing for witnesses physically outside of Singapore is allowed for non-criminal proceedings but barred in criminal proceedings; *c.f. Kim Gwang Seok v Public Prosecutor* [2012] 4 SLR 821; [2012] SGCA 51 at [24], [27] – [29],where the Court of Appeal explicitly clarified that Criminal Procedure Code (Cap 68, 2012 Rev Ed Sing) s 281 should not be applied to allow witnesses who are physically outside Singapore to give evidence via video link for criminal proceedings in Singapore. See Section 6.VII. for the text of the law.

[201] The case of *Sonica*, *supra* note 198, is the leading authority on the principles governing leave for video-conferencing. In *Sonica,* the plaintiff claimed to have entered into a contract with the defendant, which the defendant subsequently breached, leading to its loss of profits and possible legal liability to a third party. The plaintiff made an oral application pursuant to *Evidence Act, supra* note 196, s 62A for video-conferencing for two witnesses on grounds that they were unable to come to Singapore to give oral evidence at trial. See Section 6.VII for the text of the law.

[202] See *Evidence Act*, *supra* note 196, s 62A(1)(c). The four grounds are: (*a*) the witness is below the age of 16 years; (*b*) it is expressly agreed between the parties to the proceedings that evidence may be so given; ***(c)* the witness is outside Singapore**; or (*d*) the court is satisfied that it is expedient in the interests of justice to do so. (emphasis added). See Section 6.VII for the text of the law.

[203] *Evidence Act*, *supra* note 196, S62A (2). See Section 6.VII for the text of the law.

[204] See *Sonica*, *supra* note 198, at [19]. The plaintiffs' request for the second witness to give evidence through video-conferencing was rejected as his evidence related merely to the credibility of witnesses. See Section 6.VII for the text of the law.

conducted through video conferencing, it may not allow video conferencing to proceed.[205]

- **Whether the person giving evidence is a party to the proceedings, or is giving testimony as a witness**: Video-conferencing may be requested for two kinds of witnesses- one who is a party to the proceedings and one who is not.

4.51. In cases where the witness is not a party to the proceedings and is in a separate jurisdiction, they are non-compellable to testify in court. Courts are thus more sympathetic to the need for video-conferencing.[206] Conversely, where the witness is a party to the proceeding, courts are less inclined to allow the use of video-conferencing, though this is not decisive.[207] Additional litigation will be needed to test the courts' willingness to allow migrant worker clients to appear remotely.

4.52. **Stage 3:** Finally, pursuant to s 62A(5), the court "shall not make an order under this section [...] if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings."[208] The court will consider whether and to what extent permitting or denying video-conferencing could prejudice each party.[209]

4.53. This question of unfair prejudice is an "overriding consideration in such an application."[210]

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[205] See *IB v Comptroller of Income Tax* [2005] SGDC 50, at [42]. In the case of an appeal against the Comptroller of Income Tax's Notice of Assessment for tax payable, the appellant requested to give evidence by video-link from Xian, China. The court noted the absence of any adequate measures to safeguard the "security and confidentiality of the proceedings being conducted via video-link to private premises nominated by the Appellant" as a reason militating against video-conferencing. See Section 6.VII. for a summary of the case.

[206] See *Sonica*, *supra* note 198, at [12]. The plaintiffs' request for the first witness to give evidence through video-conferencing was granted. The court noted that the plaintiffs had no control over Mr Kawamura and they had made the necessary attempts to secure Mr Kawamura's presence in Singapore without any success. See Section 6.VII for the text of the law.

[207] Pursuant to s 62A(2), the court should consider all the other circumstances of the case. See also *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381, at [27]: "[i]f sufficient reason is given why the actual physical presence of foreign witnesses cannot be effected, a court should lean in favour of permitting video-linked evidence in lieu of the normal rule of physical testimony. Sufficient reason ought to be a relatively low threshold to overcome and should be assessed with a liberal and pragmatic attitude." See Section 6.VII for the text of the law.

[208] *Evidence Act, supra* note 196, s 62A(5). See Section 6.VII for the text of the law.

[209] See *Sonica*, *supra* note 198, at [15]. The court balanced the prejudice to the defendants if video-conferencing of the first witness was granted against the prejudice to the plaintiffs if video-conferencing was denied. It found no prejudice to the defendants, as they would not be taken by surprise by the intended testimony, there was no objection that the evidence was very complicated or technical, and the facilities utilised allowed for cross examination. Conversely, if the plaintiffs were denied leave, they would be unable to adduce evidence that was material to the main action. See Section 6.VII for a summary of the case.

[210] *Ibid*.

4.54. Ultimately, while the decision to allow for video-conferencing follows the three stage outlined above, it involves a balancing exercise by the Court between the various competing factors in the case.

iv. Evidence by Deposition

4.55. In special circumstances, when the client will not be available to give evidence by live testimony at trial, evidence via the deposition process is possible. This involves the examination of the person before a judicial officer in a formal proceeding. During the course of the examination, the substance of the testimony is recorded in the form of a deposition, which is then submitted to the registry and used as evidence at the trial.[211]

4.56. The examination is ordered by the court and takes place under oath before a Judge, the Registrar, or some other person, at any place determined by the court.[212]

4.57. Clients outside of the jurisdiction, may apply through their lawyer for a letter of request to be issued to the judicial authorities of the country in which the client is to give evidence.[213] Alternatively, an application may be made for a special examiner, appointed by the Singapore court, to take the evidence of the person in the foreign country, with the permission of the government of that country.[214] These applications can only be made in the High Court, even if the proceedings were commenced in the Subordinate Courts.[215] The client will have to bear the costs of the examination (including examiner's fees and local costs incurred in the foreign jurisdiction).[216]

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[211] See Jeffrey Pinsler, *Civil Practice in Singapore and Malaysia* (Lexis: 1996) at 578 (Lexis); "o 39 governs the procedure for evidence by deposition. O 39 must be read with a vital provision in o 38; namely, rule 9 of that Order which provides that no deposition is to be received in evidence unless the deposition was taken pursuant to an order of court under O 39, r 1, and 'either the party against whom the evidence is offered consents, or it is proved to the satisfaction of the court that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the trial'. Additionally, the party who intends to use the deposition in evidence at the trial must give notice of his intention to do so 'a reasonable time' before the trial. With regards to the issue of authenticity, a deposition 'purporting to be signed by the person before whom it was taken shall be receivable in evidence without proof of the signature being the signature of that person'."

[212] *Rules of Court*, *supra* note 15, o 39, r 1. See Section 6.X for the text of the law.

[213] *Ibid*, o 39, r 3. See Section 6.X. the text of the law.

[214] *Ibid*, o 39, r 2.

[215] *Ibid*, o 39, r 2(3).

[216] *Ibid*, o 39, r 14.

5. CONCLUSION

5.1. For migrant workers who must return home, the ideal situation is to obtain a settlement and collect payment prior to returning home.

5.2. However, when negotiations fail or where negotiations cannot be carried out, various legal routes remain available even to those who cannot stay in Singapore. What route a migrant worker should take depends upon such issues as costs, time bars to claims, evidence needed and, most importantly, the length of time that they can remain in Singapore in order to see a claim through.

5.3. For those who must return home before the claim is resolved, the MOM route is only open to the extent they can complete procedures before they leave. Clients do not need to remain in Singapore to pursue a judgment, so a lawyer may be able to collect any amount awarded or agreed to via MOM procedures after the client has returned home.

5.4. For all other clients, a claim in civil court is technically possible whether or not the client is in Singapore.

5.5. Clients who have or are about to return home should sign a POA that allows the practitioner or lawyer the authority to carry out enforcement or legal proceedings in Singapore on their behalf.

5.6. Following an analysis of statutory and case law, Chapter 4 will explain the challenges of representing a client who resides abroad, and potential avenues to finding a local cooperating partner.

6. BLACK LETTER LAW AND CASE LAW ANALYSIS

I. Introduction

6.1. Many references to various statutes and cases were made throughout Chapter 3. Arranged in alphabetical order, this section is a compilation of the relevant portions of the aforementioned statutes as well as the respective case law to better explain the position of the Singapore courts in the interpretation of the law.

II. *Bankruptcy Act* (Cap 20, 2009 Rev Ed Sing)

Section 76. Effect of bankruptcy order

(1) On the making of a bankruptcy order —

(a) the property of the bankrupt shall —

(i) vest in the Official Assignee without any further conveyance, assignment or transfer; and

(ii) become divisible among his creditors;

(b) the Official Assignee shall be constituted receiver of the bankrupt's property; and

(c) unless otherwise provided by this Act —

(i) no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the person or property of the bankrupt in respect of that debt; and

(ii) no action or proceedings shall be proceeded with or commenced against the bankrupt in respect of that debt, except by leave of the court and in accordance with such terms as the court may impose.

(2) Where a bankruptcy order is made against a firm, the order shall operate as if it were a bankruptcy order made against each of the persons who, at the time of the order, is a partner in the firm.

(3) This section shall not affect the right of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been enacted.

(4) Notwithstanding subsection (3) and section 94, no secured creditor shall be entitled to any interest in respect of his debt after the making of a bankruptcy order if he does not realise his security within 6 months from the date of the bankruptcy order or such further period as the Official Assignee may determine.

III. *Conveyancing and Law of Property Act* (Cap 61, 1994 Rev Ed Sing)

Section 48. Deposit of power of attorney

(1)

(a) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, notarial certificate or other sufficient evidence, or a true copy of the instrument duly compared therewith and marked by the Registrar, Deputy Registrar or Assistant Registrar of the Supreme Court with the words “true copy”, or, if the instrument is registered in Malaysia, an office copy thereof, may be deposited in the Registry of the Supreme Court.

(b) For the purposes of this section, a photographic reproduction of any such instrument made in such manner and of such dimensions as may be prescribed by general rule shall be deemed to be a true copy of the instrument.

(c) The affidavit or declaration, if any, verifying the execution of any instrument creating a power of attorney, or, where an office or true copy of such an instrument is deposited, an office or true copy of that affidavit or declaration, shall be deposited with the instrument or copy of the instrument, and paragraphs (a) and (b) shall apply, mutatis mutandis, to such office or true copy.

(2) In the case of any instrument creating a power of attorney in a foreign language being so deposited, there shall be deposited therewith a translation thereof, certified by a sworn interpreter of the court, or if there is no interpreter attached to the court sworn to interpret in the language in which the instrument is written, the translation shall be verified by a statutory declaration of some person qualified to translate it.

(3) A separate file of instruments so deposited shall be kept, and any person may search that file and inspect every instrument so deposited, and an office copy thereof, and if in a foreign language, of the translation thereof, shall be delivered out to him on request.

(4) A copy of an instrument so deposited may be presented at the Registry, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(5) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Registry.

(6) If the instrument so deposited is in a foreign language, an office copy of the translation deposited with the instrument shall without further proof be admissible in evidence as a correct translation of the original document.

(7) The fees to be taken in the Registry shall be fixed by the Chief Justice.

(8) If any such instrument so deposited at any time thereafter has been or is revoked, the Registrar of the Supreme Court, on being satisfied by affidavit or statutory declaration or otherwise that the instrument has been revoked, shall endorse thereon a certificate stating that it has been revoked and the date thereof, and thereupon the instrument shall be deemed to have been duly revoked as from the date of that certificate.

(9) Nothing in this section shall be deemed to affect or invalidate a revocation of any such instrument where no certificate is made or any earlier revocation thereof.

(10) Any reference in subsections (2), (3), (4), (5), (6), (8) and (9) to an instrument shall be deemed to include a reference to a true or office copy of the instrument deposited in accordance with subsection (1).

(11) Any reference in section 8 or any written law to a power of attorney deposited, filed or registered under or in the manner provided by this section includes a reference to a lasting power of attorney registered under the Mental Capacity Act 2008.

IV. *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing)

Section 281. Evidence through video or television links

(1) Notwithstanding any provision of this Code or of any other written law, but subject to the provisions of this section, the court may allow the evidence of a person in Singapore (except the accused) to be given through a live video or live television link in any trial, inquiry, appeal or other proceedings if —

(a) the witness is below the age of 16 years;

(b) the offence charged is an offence specified in subsection (2);

(c) the court is satisfied that it is in the interests of justice to do so; or

(d) the Minister certifies that it is in the public interest to do so.

(2) The offences for the purposes of subsection (1)(b) are —

(a) an offence that involves an assault on or injury or a threat of injury to persons, including an offence under sections 319 to 338 of the Penal Code (Cap. 224);

(b) an offence under Part II of the Children and Young Persons Act (Cap. 38) (relating to protection of children and young persons);

(c) an offence under sections 354 to 358 and sections 375 to 377B of the Penal Code;

(d) an offence under Part XI of the Women's Charter (Cap. 353) (relating to offences against women and girls); and

(e) any other offence that the Minister may, after consulting the Chief Justice, prescribe.

(3) Notwithstanding any provision of this Code or of any other written law, the court may order an accused to appear before it through a live video or live television link while in remand in Singapore in proceedings for any of the following matters:

(a) an application for bail or release on personal bond at any time after an accused is first produced before a Magistrate pursuant to Article 9(4) of the Constitution;

(b) an extension of the remand of an accused under section 238; and

(c) any other matters that the Minister may, after consulting the Chief Justice, prescribe.

(4) Notwithstanding any provision of this Code or of any other written law but subject to subsection (5), an accused who is not a juvenile may appear before the court through a live video or live television link while in remand in Singapore in proceedings for an application for remand or for bail or for release on personal bond when he is first produced before a Magistrate pursuant to Article 9(4) of the Constitution.

(5) A court may, if it considers it necessary, either on its own motion or on the application of an accused, require an accused to be produced in person before it in proceedings referred to in subsection (4).

(6) In exercising its powers under subsection (1), (3) or (4), the court may make an order on all or any of the following matters:

(a) the persons who may be present at the place with the witness;

(b) that a person be kept away from the place while the witness is giving evidence;

(c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;

(f) the stages in the proceedings during which a specified part of the order is to apply;

(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice;

(h) any other order that the court considers necessary in the interests of justice.

(7) The court may revoke, suspend or vary an order made under this section if —

(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;

(b) it is necessary for the court to do so to comply with its duty to ensure fairness in the proceedings;

(c) it is necessary for the court to do so in order that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;

(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or

(e) there has been a material change in the circumstances after the court has made the order.

(8) The court must not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with its duty to ensure that the proceedings are conducted fairly to all parties.

(9) An order made under this section does not cease to apply merely because the person in respect of whom it was made reaches the age of 16 years before the proceedings in which it was made are finally concluded.

(10) When a witness gives evidence in proceedings through a live video or live television link, the evidence is to be regarded for the purposes of sections 193, 194, 195, 196, 205 and 209 of the Penal Code as having been given in those proceedings.

(11) If a witness gives evidence in accordance with this section, for the purposes of this Code and the Evidence Act (Cap. 97), he is regarded as giving evidence in the presence of the court and the accused, as the case may be.

(12) In subsections (6), (10) and (11), a reference to "witness" includes a reference to an accused who appears before a court through a live video or live television link under subsection (3) or (4).

(13) The Chief Justice may make such rules as appear to him to be necessary or expedient to give effect to this section and for prescribing anything that may be prescribed under this section.

	Kim Gwang Seok v Public Prosecutor **[2012] 4 SLR 821; [2012] SGCA 51**
Holding	● [24]: "Parliament clearly intended that s 364A should not be applied to allow witnesses who were physically outside Singapore to give evidence via video link for criminal proceedings in Singapore because of the potential problem of foreign witnesses giving false evidence to exonerate accused persons, particularly in cases involving drug offences, which was exactly the situation in the present case." ● Furthermore, it seemed that the norm was that witnesses had to be physically present in court to give evidence, as a matter of both practice and law. The provisions in the CPC were based on the assumption that the entire trial process, which included the giving of evidence by witnesses, was to be physically conducted in a courtroom. The manner in which s 364A itself was framed reinforced this point: s 364A provided a sole and exceptional avenue for allowing a witness to give evidence in a criminal proceeding while physically outside of the court through video link, as could be inferred from the presence of the words "[n]otwithstanding any other provision of this Act or the Evidence Act" at the beginning of s 364A: at [27 and [28] ● As far as adduction of evidence by video link was concerned, Parliament clearly intended that criminal proceedings were to be treated differently from civil proceedings. Section 62A of the Evidence Act (Cap 97, 1997 Rev Ed) expressly permitted witnesses to give evidence from abroad via video link for civil proceedings in Singapore. For criminal proceedings, the witnesses who were giving evidence via video link had to be present in Singapore even though they need not be physically present in court before the judge.
Summary of facts	The appellant was a Korean national who was charged for an offence under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) of engaging in a conspiracy to export drugs from Singapore to Australia. He filed a criminal motion seeking leave from the High Court to allow five Korean nationals to testify for him at his impending trial via video link from Korea, with a view towards establishing his defence to the charge.

V. *Employment Act* (Cap 91, 2009 Rev Ed Sing)

Section 2. Interpretation

(1) In this Act, unless the context otherwise requires — …

"employee" means a person who has entered into or works under a contract of service with an employer and includes a workman, and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any provision thereof, but does not include —

(a) any seafarer;

(b) any domestic worker;

(c) subject to subsection (2), any person employed in a managerial or an executive position; and

(d) any person belonging to any other class of persons whom the Minister may, from time to time by notification in the Gazette, declare not to be employees for the purposes of this Act;

Section 3. Appointment of officers

(1) The Minister may appoint an officer to be styled the Commissioner for Labour (referred to in this Act as the Commissioner) and also one or more officers to be styled Deputy Commissioner for Labour, Principal Assistant Commissioner for Labour or Assistant Commissioner for Labour, who, subject to such limitations as may be prescribed, may perform all duties imposed and exercise all powers conferred on the Commissioner by this Act, and every duty so performed and power so exercised shall be deemed to have been duly performed and exercised for the purposes of this Act.

(2) The Minister may appoint such number of inspecting officers and other officers as he may consider necessary or expedient for the purposes of this Act.

Section 10. Notice of termination of contract

(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate the contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by any provision made for the notice in the terms of the contract of service, or, in the absence of such provision, shall be in accordance with subsection (3).

(3) The notice to terminate the service of a person who is employed under a contract of service shall be not less than —

(a) one day's notice if he has been so employed for less than 26 weeks;

(b) one week's notice if he has been so employed for 26 weeks or more but less than 2 years;

(c) 2 weeks' notice if he has been so employed for 2 years or more but less than 5 years; and

(d) 4 weeks' notice if he has been so employed for 5 years or more.

(4) This section shall not be taken to prevent either party from waiving his right to notice on any occasion.

(5) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

Section 115. Commissioner's power to inquire into complaints

(1) Subject to this section, the Commissioner may inquire into and decide any dispute between an employee and his employer or any person liable under the provisions of this Act to pay any salary due to the employee where the dispute arises out of any term in the contract of service between the employee and his employer or out of any of the provisions of this Act, and in pursuance of that decision may make an order in the prescribed form for the payment by either party of such sum of money as he considers just without limitation of the amount thereof.

(2) The Commissioner shall not inquire into any dispute in respect of matters arising earlier than one year from the date of lodging a claim under section 119 or the termination of the contract of service of or by the person claiming under that section:

Provided that the person claiming in respect of matters arising out of or as the result of a termination of a contract of service has lodged a claim under section 119 within 6 months of the termination of the contract of service.

(3) The powers of the Commissioner under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by a subcontractor for labour against a contractor or subcontractor for any sum which the subcontractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or subcontractor and to make such consequential orders as may be necessary to give effect to his decision.

(3A) Where the employee is employed in a managerial or an executive position, an order for the payment of money under subsection (1) shall not exceed $20,000.

(3B) Subject to subsection (3C), any order made by the Commissioner under subsection (1) in the absence of a party concerned or affected by the order may be set aside or varied by the Commissioner, on the application of that party, on such terms as the Commissioner thinks just.

(3C) An application to set aside or vary an order made by the Commissioner referred to in subsection (3B) shall be made no later than 14 days after the date of the order.

(4) In this section, "employer" includes the transferor and the transferee of an undertaking or part thereof referred to in section 18A.

Section 117. Right of appeal

(1) Where any person interested is dissatisfied with the decision or order of the Commissioner, he may, within 14 days after the decision or order, appeal to the High Court from the decision or order.

(2) The procedure governing any such appeal to the High Court shall be as provided for in the Rules of Court.

Section 119. Procedure for making and hearing claims

(1) The mode of procedure for the making and hearing of claims shall be as follows:

(a) the person claiming shall lodge a memorandum at the office of the Commissioner, specifying shortly the subject-matter of the claim and the remedy sought to be obtained, or he may make his claim in person to the Commissioner who shall immediately reduce it or cause it to be reduced in writing;

(b) upon receipt of the memorandum or verbal claim and of the registration fee payable by the person in accordance with the rates specified in the Second Schedule, the Commissioner shall summon in writing the party against whom the claim is made, giving reasonable notice to him of the nature of the claim and the time and place at which the claim will be inquired into, and he shall also notify or summon all persons whose interests may appear to him likely to be affected by the proceedings;

(c) the Commissioner may also summon such witnesses as either party may wish to call;

(d) if the party against whom a claim is made wishes to make a counterclaim against the party claiming, he shall notify the Commissioner and the other party in writing of the nature and amount of the counterclaim not less than 3 days before the date of the inquiry;

(e) at any time between the issuing of summons and the hearing of the claim, the Commissioner may hold or cause to be held a preliminary inquiry at which the party claiming and the party against whom the claim is made shall be present after having been notified in writing of the inquiry;

(f) at the preliminary inquiry the parties may amend or withdraw the whole claim or portion thereof, make a counterclaim or reach a settlement in respect of the claim;

(g) if a settlement is effected at a preliminary inquiry in respect of a claim or portion thereof, the Commissioner shall make an order recording the terms of the settlement and that order shall have effect as if it were an order made under paragraph (h);

(h) at the time and place appointed the parties shall attend and state their case before the Commissioner and may call evidence, and the Commissioner, having heard on oath or affirmation the statements and evidence and any other evidence which he may consider necessary, shall give his decision and make such order in the prescribed form as may be necessary for giving effect to the decision;

(i) if any person interested has been duly summoned by the Commissioner to attend at the inquiry and makes default in so doing, the Commissioner may hear the claim and make his decision in the absence of that person notwithstanding that the interest of that person may be prejudicially affected by his decision;

(j) the Commissioner shall keep a case book, in which he shall enter notes of the evidence taken and the decisions arrived at in each case heard before him and shall authenticate them by attaching his signature thereto, and the record in the case book shall be sufficient evidence of the giving of any decision, or of the making of any order, and of the terms thereof; and any person interested in a dispute, decision or order, shall be entitled to a copy of the record upon payment of the prescribed fee.

(2) In hearing claims or conducting proceedings under this Part, the Commissioner —

(a) shall not be bound to act in a formal manner or in accordance with the Evidence Act (Cap. 97) but may inform himself on any matters in such manner as he thinks just; and

(b) shall act according to equity, good conscience and the merits of the case without regard to technicalities.

(3) All proceedings before the Commissioner shall be held in private.

Section 122. Jurisdiction of courts not affected

Nothing in this Part shall limit or affect the jurisdiction of any court.

VI. *Employment of Foreign Manpower Act* (Cap 91A, 2009 Rev Ed Sing)

Section 5. Prohibition of employment of foreign employee without work pass

(1) No person shall employ a foreign employee unless the foreign employee has a valid work pass.

(2) No foreign employee shall be in the employment of an employer without a valid work pass.

(3) No person shall employ a foreign employee otherwise than in accordance with the conditions of the foreign employee's work pass.

(4) In any proceedings for an offence under subsection (1), it shall not be a defence for a defendant to prove that he did not know that the employee was a foreigner unless the defendant further proves that he had exercised due diligence to ascertain the nationality of the employee.

(5) For the purpose of subsection (4), a defendant shall not be deemed to have exercised due diligence unless he had checked the passport, document of identity or other travel document of the employee.

(6) Any person who contravenes subsection (1) shall be guilty of an offence and shall —

(a) be liable on conviction to a fine of not less than $5,000 and not more than $30,000 or to imprisonment for a term not exceeding 12 months or to both; and

(b) on a second or subsequent conviction —

(i) in the case of an individual, be punished with a fine of not less than $10,000 and not more than $30,000 and with imprisonment for a term of not less than one month and not more than 12 months; or

(ii) in any other case, be punished with a fine of not less than $20,000 and not more than $60,000.

(6A) *[Deleted by Act 24 of 2012 wef 09/11/2012]*

(7) Any person who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years or to both.

(7A) Any person who contravenes subsection (3) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000.

(8) For the purposes of this section —

(a) *[Deleted by Act 24 of 2012 wef 09/11/2012]*

(b) for the avoidance of doubt, where a person has been convicted of an offence under subsection (6), and he has on a previous occasion been convicted for contravening section 5(1) of the Employment of Foreign Workers Act (Cap. 91A, 1997 Ed.) in force immediately before 1st July 2007, the first-mentioned conviction shall be considered a second or subsequent conviction under subsection (6); and

(c) all convictions against the same person for the contravention of subsection (1) at one and the same trial shall be deemed to be one conviction.

VII. *Evidence Act* (Cap 97, 1997 Rev Ed Sing)

Section 23. Admissions in civil cases when relevant

(1) In civil cases, no admission is relevant if it is made —

(*a*) upon an express condition that evidence of it is not to be given; or

(*b*) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

(2) Nothing in subsection (1) shall be taken —

(*a*) to exempt any advocate or solicitor from giving evidence of any matter of which he may be compelled to give evidence under section 128; or

(*b*) to exempt any legal counsel in an entity from giving evidence of any matter of which he may be compelled to give evidence under section 128A.

Section 62A. Evidence through live video or live television links

(1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if —

(a) the witness is below the age of 16 years;

(b) it is expressly agreed between the parties to the proceedings that evidence may be so given;

(c) the witness is outside Singapore; or

(d) the court is satisfied that it is expedient in the interests of justice to do so.

(2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:

(a) the reasons for the witness being unable to give evidence in Singapore;

(b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and

(c) whether any party to the proceedings would be unfairly prejudiced.

(3) The court may, in granting leave under subsection (1), make an order on all or any of the following matters:

(a) the persons who may be present at the place where the witness is giving evidence;

(b) that a person be excluded from the place while the witness is giving evidence;

(c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;

(f) the stages in the proceedings during which a specified part of the order is to have effect;

(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and

(h) any other order the court considers necessary in the interests of justice.

(4) The court may revoke, suspend or vary an order made under this section if —

(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;

(b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;

(c) it is necessary for the court to do so, so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;

(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or

(e) there has been a material change in the circumstances after the court has made an order.

(5) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.

(6) An order made under this section shall not cease to have effect merely because the person in respect of whom it was made attains the age of 16 years before the proceedings in which it was made are finally determined.

(7) Evidence given by a witness, whether in Singapore or elsewhere, through a live video or live television link by virtue of this section shall be deemed for the purposes of sections 193, 194, 195, 196, 205 and 209 of the Penal Code (Cap. 224) as having been given in the proceedings in which it is given.

(8) Where a witness gives evidence in accordance with this section, he shall, for the purposes of this Act, be deemed to be giving evidence in the presence of the court.

(9) The Rules Committee constituted under the Supreme Court of Judicature Act (Cap. 322) may make such rules as appear to it to be necessary or expedient for the purpose of giving effect to this section and for prescribing anything which may be prescribed under this section.

	IB v Comptroller of Income Tax Tax **[2005] SGDC 50**
Holding	• In considering whether to grant leave under s 62A(2), the Board considered measures to safeguard the security and confidentiality of the proceedings being conducted via video conferencing to private premises nominated by the Appellant. [42] "The Appellant's subsequent application for leave at the last minute before the hearing to give evidence by video-link from Xian, China was opposed by the respondent on the grounds that they would be unfairly prejudiced. For evidence through live video-link, the applicant must satisfy the conditions in s 62A of the Evidence Act. Some of the circumstances that the Board should consider whether or not to grant leave in this case are laid out in s 62A(2) of the Evidence Act. After hearing the parties' submissions, the Board refused to grant leave to the Appellant's application on these reasons as well as the absence of any adequate measure to safeguard the security and confidentiality of the proceedings being conducted via video-link to private premises nominated by the Appellant."
Summary of facts	Facts of the case not particularly relevant to this context

	Peters Roger May v Pinder Lillian Gek Lian **[2006] 2 SLR 381**
Holding	• Held that the ready availability and accessibility of video conferencing coupled with its relative affordability has diminished the significance of the physical convenience of a witness as a yardstick in assessing the appropriateness of a forum. [26]: "The easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access. Historically, the availability and convenience of witnesses was a relevant

	factor as it had a bearing on the costs of preparing and/or presenting a case and, most crucially, in ensuring that all the relevant evidence was adduced before the adjudicating court. The advent of technology however has fortunately engendered affordable costs of video-linked evidence with unprecedented clarity and life-like verisimilitude, so that the importance of this last factor recedes very much into the background both in terms of relevance and importance. In other words, the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the "physical convenience" of witnesses as a yardstick in assessing the appropriateness of a forum." • The threshold to granting leave for video conferencing ought to be relatively low. [27]: "The respondent has not advanced any arguments, cogent or otherwise, why adducing evidence by video link in this case would be in any way inconvenient, unsuitable or prejudicial. If sufficient reason is given why the actual physical presence of foreign witnesses cannot be effected, a court should lean in favour of permitting video-linked evidence in lieu of the normal rule of physical testimony. Sufficient reason ought to be a relatively low threshold to overcome and should be assessed with a liberal and pragmatic latitude. If a witness is not normally resident within a jurisdiction,that may itself afford a sufficient reason with a view to minimising costs. On the other hand, if for instance the evidence of an important foreign witness cannot be voluntarily obtained by video link, this could tip the balance in favour of hearing the matter in the foreign jurisdiction where the witness resides so the witness can be compelled to give evidence there. Even then, the importance of that witness personally giving evidence as a factor may not be critical if deposition taking is available. The relative gravity of this factor must invariably be weighed and measured against the nature and relevance of the proposed evidence."
Summary of facts	The parts of the case that are relevant pertain to forum non conveniens and its relationship with video conferencing. The respondent requested for a stay of proceedings, arguing that England as opposed to Singapore was the more appropriate forum for the determination of the proceedings, one reason being the convenience of witnesses.

	Sonica Industries v Fu Yu Manufacturing Ltd **[1999] SGCA 63**
Holding	• There are four grounds for an application for leave under s 62A(1) of the Evidence Act. Further the court must have regard to all the circumstances of the case, including the three non-exhaustive factors in s 62A(2). Finally, the court

	will consider the overriding question of unfair prejudice under s 62A(5). [10]: "In this case, the application was made on the ground that the two witnesses were outside Singapore and were unable to come to Singapore to give oral evidence. Thus, para (*c*) of s 62A(1) was satisfied. That, of course, was not the end of the matter. The court must have regard to all the circumstances of the case, including the three particular circumstances described in sub-s (2) of s 62A of the Act." [15]: "The question of unfair prejudice is an overriding consideration in such an application. Subsection (5) of s 62A of the Act provides expressly that the court is not to make an order under that section, or to include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings." • With regards to Mr Kawamura, the plaintiff's request for video conferencing was granted. First, in considering all circumstances of the case pursuant to s 62A(2), the court noted that the plaintiffs had no control over Mr. Kawamura and had made the necessary attempts to secure his presence in Singapore without any success. Second, regarding the issue of prejudice, the court balanced the prejudice to the defendant's if videoconferencing were granted against prejudice to the plaintiff's if video-conferencing were denied. [12]: "The fact remained that MrKawamura had always been located overseas, and in particular in California. To come to Singapore to give evidence for the plaintiffs at the trial, Mr Kawamura had to make a special arrangement for the purpose. It must be remembered that Mr Kawamura was not in any way obliged to give evidence on behalf of the plaintiffs. Indeed, Mr Kawamura is an employee of Kanematsu, and according to the plaintiffs, Kanematsu has made a claim against the plaintiffs and is therefore in some degree of contention with them. Clearly, the plaintiffs have no control over Mr Kawamura and can only rely on his willingness to help them. In all the circumstances, we were of the view that the plaintiffs had made the necessary attempts to secure Mr Kawamura's presence in Singapore for the purpose of the trial but without any success." [16]: "In this case, we can see no prejudice to the defendants by an order allowing Mr Kawamura to give evidence via live video or television link. The plaintiffs have identified the particular facts and issues which could be proved by Mr Kawamura's testimony. A statement of the evidence of Mr Kawamura had already been furnished to the defendants. The defendants would not be taken by surprise by the evidence that is intended to be led. There was also no objection that the evidence of Mr Kawamura would be very complicated or technical. The video or television link facilities

	would still allow the defendants' counsel to cross-examine Mr Kawamura on his evidence." [17]: "On the other hand, if the plaintiffs were refused leave to use the video or television link facilities, they would be unable to adduce critical evidence pertaining to the resale contract alleged to have been made with Kanematsu, as well as evidence on how Kanematsu came to cancel their orders with the plaintiffs. Apparently, the alleged contract for the resale was not otherwise evidenced by any purchase order, due to Kanematsu's standard procedure. Mr Kawamura would be in a position to give relevant evidence on this point. We agreed with the plaintiffs that Mr Kawamura's evidence on the resale contract was material in the main action. Leave should be given for such evidence to be adduced via video link, as no prejudice is thereby caused to the defendants." • With regards to Mr Lee, the plaintiff's request for video conferencing was rejected as his evidence related merely to the credibility of the witness. [19]: "As for the other witness, Mr Paul Lee, his evidence related solely to the alleged improper threat alleged to have been uttered to Mr Kawamura by the defendants' officers. This evidence was not material to the issues in the main action and related merely to the credibility of Mr Kawamura and the defendants' witnesses. At best, this evidence was only peripheral to the main issues in the trial, and we did not think that it justified an order allowing Mr Paul Lee to give evidence by live video or television link."
Summary of facts	The plaintiff claimed to have entered into a contract with the defendant which was subsequently breached by the defendant, resulting in a loss of profits and possible legal liability to a third party. The plaintiff made an oral application pursuant to s 62A of the Evidence Act for leave to allow videoconferencing for two witnesses, Mr Kawamura and Mr Lee, on grounds that they were unable to come to Singapore to give oral evidence at trial.

VIII. *Immigration Regulations* (Cap 133, Reg 1, 1998 Rev Ed Sing)

Regulation 2. Definitions

"Controller" includes —

(a) an immigration officer or other person authorised by the Controller to act generally on his behalf under these Regulations; and

(b) where the Controller authorises an immigration officer or other person to act on his behalf for the purpose of one or more but not all of these Regulations, for the purposes of such regulation, the immigration officer or other person so authorised;

Regulation 15. Special pass

(1) A special pass, other than a special pass issued under section 6A[217] of the Act, may be issued by the Controller to any person if the Controller considers the issue of such a pass desirable —

(a) in order to afford an opportunity of making enquiry for the purpose of determining whether that person is entitled to an entry permit or is otherwise entitled to enter Singapore under the provisions of the Act or of these Regulations or whether that person is a prohibited immigrant;

(b) in order to afford that person a reasonable opportunity of prosecuting an appeal under the provisions of the Act against any decision of the Controller; or

(c) for any other special reason.

(2) A special pass shall entitle the holder thereof to enter Singapore or remain therein for such period, not exceeding one month, as may be stated in the pass except that the Controller may from time to time extend the period of the pass, and in special circumstances, the period of such extension may exceed one month.

(3) [Deleted by S 393/2008]

(4) A special pass may at any time be cancelled by the Controller except that the Controller shall not cancel a pass issued under paragraph (1)(b) otherwise than for breach of any condition imposed in respect thereof until the appeal, in respect of which the pass has been issued, has been determined.

(5) Where a special pass is to be issued, the applicant shall, if so required, furnish to the Controller 2 recent photographs of himself.

IX. *Limitations Act* (Cap 163, 1996 Rev Ed Sing)

Section 6. Limitation of actions of contract and tort and certain other actions

(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

[217] Immigration Regulations, *supra* note 1, s 6A. See Section 6.VIII

(3) An action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

	Desert Palace Inc v Poh Soon Kia **[2009] SGCA 60**
Holding	Held that s 6(3) of the Limitation Act does not prescribe any time bar for garnishee proceedings or a writ of seizure. In this regard, the court noted that a distinction has been drawn in case law between an "action" upon a judgment and an "execution" of a judgment, and highlighted policy reasons supporting such a distinction. [60]: "In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304, a judgment creditor presented a winding-up petition based on a judgment that was more than six years old. The judgment debtors' attempt to strike out the winding up petition on the basis that it was statute-barred after the expiration of six years from the date on which the judgment became enforceable was dismissed. It was held that "an action upon a judgment" had the special or technical meaning of a "fresh action" brought upon a judgment in order to obtain a second judgment, which could be executed. Insolvency proceedings, whether personal or corporate, did not fall within the scope of that special meaning and it was not open to the court to interpret the expression "action upon a judgment" in s 24 (1) of the 1980 Act in the sense indicated by the extended definition of "action" in s 38(1) which stated, *inter alia*, that "[i]n this Act, unless the context otherwise requires, 'action' includes any proceeding in a court of law, including an ecclesiastical court". Mummery LJ in the English Court of Appeal said (at [31]): There is, in my opinion, much to be said for the submission of Mr Anthony Mann QC (as he then was) appearing as counsel for the plaintiff judgment creditors in *Lowsley*'s case [1999] 1 ACT 329 at 333: There are good policy reasons for distinguishing between action and execution. Limitation statutes are intended to prevent stale claims, to relieve a potential defendant of the uncertainty of a potential claim against [him] and to remove the injustice of increasing difficulties of proof as time goes by. These considerations do not apply to execution. If it is unfair to have a judgment debt outstanding with interest running at a high rate, the debtor has the remedy of paying the debt or taking out his own bankruptcy if he cannot pay it" [63]: "In the LA, unless the context otherwise requires, an "action" also includes a suit or any other proceedings in a court. Basically, there are two ways of enforcing a judgment: by execution and by action. However, a writ of execution does not come within s 6 (3) of the LA, a stand that I would take in reliance on the authorities above. The Court of Appeal in *Tan Kim Seng v Ibrahim Victor Adam* [2004] 1 SLR(R) 181 at [29] also observed that there was a distinction between "execution" and "an action upon any judgment" and referred to Halsbury's Laws of England vol 28 (Butteworths, 4th Ed Reissue, 1997) at para 916: [A]n action upon a judgment applies only to the enforcement of judgments by suing on them and does not apply to the issue of executions upon judgments for which the leave of the court is required, after six years have elapsed, by RSC Ord 46 r 2(1)(a); in

	matters of limitation the right to sue on a judgment has always been regarded as quite distinct from the right to issue execution under it, but the court will not give leave to issue execution when the right of action is barred." [64] "As such, the law of limitation of actions would not affect the rules in relation to execution (and would also not apply to applications to levy execution for that matter). If it did, then an argument could be made that O 46 r 2 which subjected the writ of execution to enforce a judgment or order to the leave of the court where six years or more had lapsed since the date of the judgment or order could be in conflict with s 6(3) of the LA which allowed 12 years for bringing an action upon any judgment as of right under the statute. Further, the fact that the court could theoretically grant leave to the plaintiff to issue a writ of execution to enforce a judgment even after more than 12 years had elapsed would appear to contradict the time bar set out in s 6(3) of the LA, if that section was intended to apply to enforcement of a judgment by way of a writ of execution. If a matter was time-barred under the LA, a court would not have the power or the discretion to extend time beyond the time bar by granting leave. [65]: "The policy reasons for distinguishing between "action" and "execution" as set out by Mummery LJ (see [60] above), and the reasons why the considerations of potential defendants being subjected to the uncertainty of stale claims and the injustice of increasing difficulties of proof with time did not apply to the procedural steps needed for execution on a judgment already obtained (as opposed to that of a fresh substantive action upon a judgment) made much sense to me. They also explained the rationale for the absence of a time bar for the procedural enforcement of a judgment like the writ of execution or other modes of enforcement; and why a case of a fresh action on a judgment to obtain another substantive judgment must be treated differently and be made subject to a time bar. If a limitation period were to exist for execution of a judgment, then a clever judgment debtor can simply avoid payment of the judgment debt by hiding his assets well and keeping them out of reach of the judgment creditor as long as possible by using the international financial and banking systems and setting up shell companies or trusts in overseas jurisdictions to hold and hide his assets. The existence of a time bar for procedural execution may incentivise a judgment debtor to frustrate the judgment creditor's search for his assets until the execution on the judgment against him is time-barred. Passage of time should not on principle be allowed to morph into an instrument to extinguish a judgment debt and make a mockery of the execution process on a judgment of the court." [66]: "Public policy and the interests of justice should instead lean in favour of the position that it is for the judgment debtor to seek out the judgment creditor and settle the judgment creditor's judgment debt expeditiously. There is no good reason why the court should favour cat and mouse games that are usually played out when judgment debtors use all possible means to delay and if possible evade enforcement or execution. The court ought not to favour those who have no qualms about flouting orders of court to pay on judgment debts." [67]: "A time bar for procedural execution of a judgment would have

	the inadvertent and unintended effect of encouraging such cat-and-mouse games. The resources of both the court and the judgment creditor are often expended unnecessarily whereby the judgment creditor has to search far and wide for the assets of the judgment debtor, take up numerous court enforcement measures and try to execute on the judgment that he has obtained, probably with much effort and costs on his part already. It would not make sense to make it more difficult for the judgment creditor to obtain the fruits of the judgment he has obtained by imposing a time bar for procedural execution on judgments in the LA. A judgment debtor ought to recognise the authority of the order of the court directing that he, the judgment debtor, pays the judgment creditor. By not paying, it is the judgment debtor who is breaching the order of the court for him to pay. It is important to note that a judgment is no longer a claim but an order of court to be obeyed by the judgment debtor after the claim has been adjudicated by the court in favour of the judgment creditor. The judgment creditor as the winning party tries to ensure that the judgment as an order of the court is respected and obeyed by the losing party (and is not rendered a paper judgment to be treated with scorn and disdain). Hence, for good public policy reasons, the court should lean in favour of assisting the winning party rather than the losing party. This in my view is a good reason to interpret "action upon any judgment" in s 6(3) of the LA restrictively to exclude a writ of execution on a judgment and all other modes of enforcement like garnishee proceedings, charging orders and insolvency proceedings, for which the LA does not prescribe any time bar, and accordingly, a judgment obtained is never "dead" because procedural execution on it always remains possible."
Summary of facts	Facts of the case not particularly relevant to this context.

X. *Rules of Court* (Cap 322, R 5, 2006 Rev Ed Sing)

Interpretation (O. 59, r. 1)

(1) In this Order —

"costs" includes fees, charges, disbursements, expenses and remuneration;

Order 23. Security for costs

Security for costs of action, etc. (O. 23, r.1)

(1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court —

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court —

(a) that a party, who is not a party to the action or proceeding (referred to hereinafter as a ''non-party''), has assigned the right to the claim to the plaintiff with a view to avoiding his liability for costs; or

(b) that the non-party has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or proceeding, and the non-party is a person against whom a costs order may be made, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the non-party to give such security for the defendant's costs of the action or other proceeding as the Court thinks just.

(4) An application for an order under paragraph (3) shall be made by summons, which must be served on the non-party personally and on every party to the proceedings.

(5) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.

(6) The references in paragraphs (1), (2) and (3) to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

Manner of giving security (O. 23, r. 2)

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any), as the Court may direct.

Saving for written law (O. 23, r. 3)

This Order is without prejudice to the provisions of any written law which empowers the Court to require security to be given for the costs of any proceedings.

Order 35. Proceedings at Trial

Failure to appear by both parties or one of them (O. 35, r. 1)

(1) If, when the trial of an action is called on, neither party appears, the Judge may dismiss the action or make any other order as he thinks fit. (2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.

	Lin Tsang Kit and Another v Chng Thiam Kwee **[2005] SGHC 10**
Holding	• The second plaintiff's claim was dismissed under O 35 r. 1 of the Rules of Court because his "written testimony would have no probative value whatsoever, as the contents and his veracity could not be tested under cross examination." [30]: "I had made it clear from the outset to counsel for the plaintiffs that if the second plaintiff did not testify, I would have no alternative but to dismiss his claim. His written testimony would have no probative value whatsoever, as the contents and his veracity could not be tested under cross-examination. Accordingly, as the second plaintiff failed to testify despite my warning his counsel of the consequences thereof, I am dismissing his claim pursuant to O 35 r 1(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed)."
Summary of facts	Case involving a claim by two plaintiffs against a defendant Singapore businessman for breach of trust by selling trust shares without accounting to them for the sales proceeds. Alternatively, it was argued that the court should find that a trust was created between the plaintiffs and the defendant's company, with the defendant as managing director acting dishonestly in assisting the company's breach of trust. According to the plaintiff's counsel, the second plaintiff had applied to court to give his evidence by way of video conferencing due to his advanced and medical condition but his application was denied. The second plaintiff did not appear to testify at trial.

Order 38. Evidence in General

General rule: Witnesses to be examined (O. 38, r. 1)

Subject to these Rules and the Evidence Act (Chapter 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court.

Depositions when receivable in evidence at trial (O. 38, r. 9)

(1) No deposition taken in any cause or matter shall be received in evidence at the trial of the cause or matter unless —

> (a) the deposition was taken in pursuance of an order under Order 39, Rule 1; and
>
> (b) either the party against whom the evidence is offered consents or it is proved to the satisfaction of the Court that the deponent is dead, or beyond the jurisdiction of the Court or unable from sickness or other infirmity to attend the trial.

(2) A party intending to use any deposition in evidence at the trial of a cause or matter must, at a reasonable time before the trial, give notice of his intention to do so to the other party.

(3) A deposition purporting to be signed by the person before whom it was taken shall be receivable in evidence without proof of the signature being the signature of that person.

Order 39. Evidence by Deposition: Examiners of the court

Power to order depositions to be taken (O. 39, r. 1)

(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

Where person to be examined is out of jurisdiction (O. 39, r. 2)

(1) Where the person in relation to whom an order under Rule 1 is required is out of the jurisdiction, an application may be made —

> (a) for an order in Form 74 under that Rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or
>
> (b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order in Form 75 under that Rule appointing a special examiner to take the evidence of that person in that country.

(2) An application may be made for the appointment as special examiner of a Singapore consul in the country in which the evidence is to be taken or his deputy —

> (a) if there subsists with respect to that country a Civil Procedure Convention providing for the taking of the evidence of any person in that country for the assistance of proceedings in the High Court; or

(b) with the consent of the Minister. (3) An application under this Rule can only be made in the High Court even if the proceedings are commenced in the Subordinate Courts.

Order for payment of examiner's fees (O. 39, r. 14)

(1) If the fees and expenses due to an examiner are not paid, he may report that fact to the Court, and the Court may make an order against the party, on whose application the order for examination was made, to pay the examiner the fees and expenses due to him in respect of the examination.

(2) An order under this Rule shall not prejudice any determination on the taxation of costs or otherwise as to the party by whom the costs of the examination are ultimately to be borne.

Order 45. Enforcement of Judgment and Orders

Enforcement of judgment, etc., for payment of money (O. 45, r. 1)

(1) Subject to these Rules and section 43 of the Subordinate Courts Act (Chapter 321) where applicable, a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by one or more of the following means:

(*a*) writ of seizure and sale;

(*b*) garnishee proceedings;

(*c*) the appointment of a receiver;

(*d*) in a case in which Rule 5 applies, an order of committal.

(2) Subject to these Rules, a judgment or order for the payment of money into Court may be enforced by one or more of the following means:

(*a*) the appointment of a receiver;

(*b*) in a case in which Rule 5 applies, an order of committal.

(3) Paragraphs (1) and (2) are without prejudice to any other remedy available to enforce such a judgment or order as is therein mentioned or to the power of a Court under the Debtors Act (Chapter 73) to commit to prison a person who makes default in paying money adjudged or ordered to be paid by him, or to any written law relating to bankruptcy or the winding up of companies.

(4) In this Order, references to any writ shall be construed as including references to any further writ in aid of the first mentioned writ.

Order 46. Writ of Execution: General

When leave to issue any writ of execution is necessary (O. 46, r. 2)

(1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases:

(a) where **6 years or more** have lapsed since the date of the judgment or order;

	Desert Palace Inc v Poh Soon Kia **[2009] SGCA 60**
Holding	• While the court determined that there are no time bars for the execution of judgments, it nevertheless noted that with regards to writ of seizures, pursuant to O 46 r 2 of the Rules of Court, they may not be issued without the leave of court where "6 years or more have lapsed since the date of the judgment or order". [68]: "I recognise the existence of O 46 r 2 where a writ of execution (which includes a writ of seizure and sale, a writ of possession and a writ of delivery) to enforce a domestic judgment or order may not be issued without the permission of the court where six years or more has elapsed but this does not mean that a time bar of six years has thereby been created. A statutory limitation must be created by way of an Act of Parliament as in the Limitation Act, and not in some subsidiary legislation (*eg*, in the Rules of Court) since a time bar has the effect of taking away a substantive right, *ie*, enforcement of a domestic judgment by way of a writ of execution. I further note that O 46 is limited in its scope and it applies only to a writ of execution but not other forms of enforcement on a judgment. Although there is no time bar, the court should nevertheless, for good administration of justice, monitor enforcement of its judgments by way of a writ of execution if more than six years had elapsed, which I believe is the rationale for O 46. Order 46 r 2 balances the need to allow time for unhindered execution on a judgment by the judgment creditor and the need to see that the judgment creditor does not sit on his hands and make no real effort to search for the assets of the judgment debtor and use the appropriate enforcement measures to satisfy his judgment debt. The requirement for the court's discretionary leave as prescribed under O46 is more a procedural and monitoring measure than a substantive mandatory measure to extinguish execution on a judgment the moment six years or more has elapsed since the date of the judgment. In any event, if such a substantive mandatory measure amounting to a statutory time bar was intended, then it should more appropriately be made by amending the LA than by inserting it as a rule within the Rules of Court."
Summary of facts	Facts of the case not particularly relevant to this context.

Order 47. Writ of Seizure and Sale

Power to stay execution by writ of seizure and sale (O. 47, r. 1)

(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution —

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or

(b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in Rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the Court thinks fit.

(2) An application under this Rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that the party liable to execution did not enter an appearance in the action.

Separate writs to enforce payment of costs, etc. (O. 47, r. 2)

(1) Where only the payment of money, together with costs to be taxed, is adjudged or ordered, then, if when the money becomes payable under the judgment or order the costs have not been taxed, the party entitled to enforce that judgment or order may issue a writ of seizure and sale to enforce the judgment or order and, not less than 8 days after the issue of that writ, he may issue a second writ to enforce payment of the taxed costs.

(2) A party entitled to enforce a judgment or order for the delivery of possession of any property (other than money) may, if he so elects, issue a separate writ of seizure and sale to enforce payment of any damages or costs awarded to him by that judgment or order.

Where landlord claims arrears of rent of premises where property seized (O. 47, r. 3)

(1) Where the landlord or any other person entitled to receive the rent of the premises in which any movable property has been seized by the Sheriff has any claims for arrears of rent of those premises, he may apply to the Court, at any time before the sale of such property, for a writ of distress for recovery of such arrears of rent.

(2) When a writ of distress has been issued the provisions of section 20 of the Distress Act (Chapter 84) shall apply.

(3) Unless a writ of distress is issued for the recovery of such arrears of rent, the property seized by the Sheriff shall be deemed not to be liable to be seized under a writ of distress and to be free from all claims in respect of rent and may be dealt with accordingly and the landlord or other person entitled to receive rent as aforesaid shall have no claim in respect of the property or to the proceeds of sale or any part thereof.

Immovable property (O. 47, r. 4)

(1) Where the property to be seized consists of immovable property or any interest therein, the following provisions shall apply:

(a) seizure shall be effected by registering under any written law relating to the immovable property a writ of seizure and sale in Form 83 (which for the purpose of this Rule and Rule 5 shall be called the order) attaching the interest of the judgment debtor in the immovable property described therein and, upon registration, such interest shall be deemed to be seized by the Sheriff;

(b) an application for an order under this Rule may be made by ex parte by summons;

(c) the application must be supported by an affidavit —

(i) identifying the judgment or order to be enforced;

(ii) stating the name of the judgment debtor in respect of whose immovable property or interest an order is sought;

(iii) stating the amount remaining unpaid under the judgment or order at the time of application;

(iv) specifying the immovable property or the interest therein in respect of which an order is sought; and

(v) stating that to the best of the information or belief of the deponent, the immovable property or interest in question is the judgment debtor's and stating the sources of the deponent's information or the grounds for his belief;

(d) as many copies of the order as the case may require shall be issued to the judgment creditor in order that he may present the order, in compliance with the provisions of any written law relating to such immovable property, for registration at the Registry of Deeds or the Land Titles Registry, as the case may be, of the Singapore Land Authority;

(e) after registering the order, the judgment creditor must —

(i) file a Request for direction to the Sheriff in Form 95 and a direction to the Sheriff in Form 96; and

(ii) upon compliance with sub-paragraph (i), the Sheriff must serve a copy of the order and the notice of seizure in Form 97 on the judgment debtor forthwith and, if the judgment debtor cannot be found, must affix a copy thereof to some conspicuous part of the immovable property seized;

(f) subject to sub-paragraph (g), any order made under this Rule shall, unless registered under any written law relating to such immovable property, remain in force for 6 months from the date thereof;

(g) upon the application of any judgment creditor on whose application an order has been made, the Court, if it thinks just, may from time to time by order extend the period of 6 months referred to in sub-paragraph (f) for any period not exceeding 6 months, and the provisions of sub-paragraphs (d) and (e) shall apply to such order; and

(h) the Court may at any time, on sufficient cause being shown, order that property seized under this Rule shall be released.

(2) Order 46, Rule 6 (1) and (2), shall not apply to the order made under paragraph (1).

Sale of immovable property (O. 47, r. 5)

Sale of immovable property, or any interest therein, shall be subject to the following conditions:

(a) there shall be no sale until the expiration of 30 days from the date of registration of the order under Rule 4 (1) (a);

(b) the particulars and conditions of sale shall be settled by the Sheriff or his solicitor;

(c) the judgment debtor may apply by summons to the Court for postponement of the sale in order that he may raise the amount leviable under the order by mortgage or lease, or sale of a portion only, of the immovable property seized, or by sale of any other property of the judgment debtor, or

otherwise, and the Court, if satisfied that there is reasonable ground to believe that the said amount may be raised in any such manner, may postpone the sale for such period and on such terms as are just;

(d) the judgment creditor may apply to the Court for the appointment of a receiver of the rents and profits, or a receiver and a manager of the immovable property, in lieu of sale thereof, and on such application, the Court may appoint such receiver or receiver and manager, and give all necessary directions in respect of such rents and profits or immovable property;

(e) where the interest of the judgment debtor in any immovable property, seized and sold under the order, includes a right to the immediate possession thereof, the Sheriff shall put

the purchaser in possession;

(f) pending the execution or endorsement of any deed or document which is ordinarily lawfully required to give effect to any sale by the Sheriff, the Court may by order appoint the Sheriff to receive any rents and profits due to the purchaser in respect of the property sold; and

(g) the Sheriff may at any time apply to the Court for directions with respect to the immovable property or any interest therein seized under the order and may, or, if the Court so directs, must give notice of the application to the judgment creditor, the judgment debtor and any other party interested in the property.

Securities (O. 47, r. 6)

(1) Where the property to be seized consists of any Government stock, or any stock of any company or corporation registered or incorporated under any written law, including any such stock standing in the name of the Accountant-General, to which the judgment debtor is beneficially entitled, seizure thereof must be made by a notice in Form 98, signed by the Sheriff, attaching such stock.

(2) The notice must be addressed —

(a) in the case of Government stock, to the Accountant-General;

(b) in the case of stock listed on the Stock Exchange of Singapore Ltd. and held under a central depository system, to the depository for the time being and the company or corporation concerned;

(c) in the case of other stock, to the company or corporation concerned; and

(d) in the case of stock standing in the name of the Accountant-General, to the Accountant-General, and together with a copy of the writ of seizure and sale must be served by the Sheriff by any mode of service as he thinks fit.

(3) A copy of the notice must at the same time be sent to the judgment debtor at his address for service.

(4) On receipt of such notice, the judgment debtor must hand over to the Sheriff at his office any indicia of title in his possession relating to such stock, or where any such indicia of title are not in his possession, must notify the Sheriff in writing of the name and address of the person having possession thereof.

(5) The Sheriff must further send a copy of the notice to any person, other than the judgment debtor, in whose possession he has reason to believe any such indicia of title to be.

(6) After the receipt of any notice sent under paragraph (2), and unless the notice is withdrawn, no transfer of the stock or any interest therein, as the case may be, shall be registered or effected unless the transfer be executed or directed by the Sheriff, and any such transfer or direction by the Sheriff shall have the same effect as if the registered holder or beneficial owner of such stock had executed the transfer, and shall be dealt with accordingly.

(7) All interest or dividends becoming due and payable or benefits accruing after receipt of such notice, and until withdrawal thereof or transfer or direction by the Sheriff as above mentioned, must be paid or transmitted to the Sheriff.

(8) Any notice served under paragraph (2) may be withdrawn by notice in writing to that effect signed by the Sheriff and served to the person and in the manner provided by paragraph (2).

(9) In this Order, ‘‘Government stock’’ means any stock issued by the Government or any funds of or annuity granted by the Government and ‘‘stock’’ includes shares, debentures, debenture stock and stock options.

(10) The Court, on the application of the judgment debtor or any other person interested in the stock seized under this Rule, may at any time, on sufficient cause being shown, order that the stock or any part thereof be released.

Sale of securities (O. 47, r. 7)

(1) Stock seized under Rule 6 may be sold through the agency of a broker.

(2) If the indicia of title are not in the possession of the Sheriff, he may apply to the Court for such directions as may be necessary to give effect to the sale.

** O. 47, r. 8 was deleted.*

Withdrawal and suspension of writ (O. 47, r. 9)

(1) Where any execution creditor requests the Sheriff to withdraw the seizure, he shall be deemed to have abandoned the execution, and the Sheriff shall mark the writ of seizure and sale as withdrawn by request of the execution creditor: Provided that where the request is made in consequence of a claim having been made in interpleader proceedings, the execution shall be deemed to be abandoned in respect only of the property so claimed.

(2) A writ of seizure and sale which has been withdrawn under this Rule shall not be re-issued but the execution creditor may apply by summons supported by affidavit stating the grounds of the application for a fresh writ of seizure and sale to be issued, and such writ shall take priority according to its date of issue.

Order 49. Garnishee Proceedings

Attachment of debt due to judgment debtor (O. 49, r. 1)

(1) Where a person (referred to in these Rules as the judgment creditor) has obtained a judgment or order for the payment by some other person (referred to in these Rules as the judgment debtor) of money, not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (referred to in this Order as the garnishee) is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

(2) An order in Form 101 under this Rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as is mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order mentioned in that paragraph and the costs of the garnishee proceedings.

(3) In this Order, ‘‘any debt due or accruing due’’ includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

Application for order (O. 49, r. 2)

An application for an order under Rule 1 must be made by ex parte summons supported by an affidavit in Form 102 —

(a) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application; and

(b) stating that to the best of the information or belief of the deponent the garnishee (naming him) is within the jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent’s information or the grounds for his belief.

Service and effect of order to show cause (O. 49, r. 3)

(1) An order under Rule 1 to show cause must, at least 7 days before the time appointed thereby for the further consideration of the matter, be served —

(a) on the garnishee personally; and

(b) unless the Court otherwise directs, on the judgment debtor.

(2) Such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified.

No appearance or dispute of liability by garnishee (O. 49, r. 4)

(1) Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may, subject to Rule 7, make a final order[218] in one of the forms in Form 103 under Rule 1 against the garnishee.

(2) A final order[219] under Rule 1 against the garnishee may be enforced in the same manner as any other order for the payment of money.

Dispute of liability by garnishee (O. 49, r. 5)

Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 104 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

Claims of third persons (O. 49, r. 6)

(1) If in garnishee proceedings it is brought to the notice of the Court that some person other than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the Court may order that person to attend before the Court and state the nature of the claim with particulars thereof.

(2) After hearing any person who attends before the Court in compliance with an order under paragraph (1), the Court may summarily determine the questions at issue between the claimants or make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in paragraph (1) be tried in such manner as is mentioned in Rule 5.

Judgment creditor resident outside scheduled territories (O. 49, r. 7)

(1) The Court shall not make an order under Rule 1 requiring the garnishee to pay any sum to or for the credit of any judgment creditor resident outside the scheduled territories unless that creditor produces a certificate that the Monetary Authority of Singapore has given permission under the Exchange Control Act (Chapter 99), for the payment unconditionally or on conditions which have been complied with.

(2) If it appears to the Court that payment by the garnishee to the judgment creditor will contravene any provision of the Exchange Control Act, it may order the garnishee to pay into Court the amount due to the judgment creditor and the costs of the garnishee proceedings after deduction of his own costs, if the Court so orders.

[218] Formerly known as an “order absolute”

[219] Formerly known as an “order absolute”

Discharge of garnishee (O. 49, r. 8)

Any payment made by a garnishee in compliance with a final order[220] under this Order, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.

Money in Court (O. 49, r. 9)

(1) Where money is standing to the credit of the judgment debtor in Court, the judgment creditor shall not be entitled to take garnishee proceedings in respect of that money but may apply to the Court by summons for an order that the money or so much thereof as is sufficient to satisfy the judgment or order sought to be enforced and the costs of the application be paid to the judgment creditor.

(2) On issuing a summons under this Rule the applicant must produce the summons at the office of the Accountant-General and leave a copy at that office, and the money to which the application relates shall not be paid out of Court until after the determination of the application. If the application is dismissed, the applicant must give notice of that fact to the Accountant-General.

(3) Unless the Court otherwise directs, the summons must be served on the judgment debtor at least 7 days before the day named therein for the hearing of it.

(4) Subject to Order 70, Rule 24, the Court hearing an application under this Rule may make such order with respect to the money in Court as it thinks just.

Costs (O. 49, r. 10)

The costs of any application for an order under Rule 1 or 9, and of any proceedings arising therefrom or incidental thereto, shall, unless the Court otherwise directs, be retained by the judgment creditor out of the money recovered by him under the order and in priority to the judgment debt.

Order 55. Appeals to High Court from court, tribunal or person

Application (O. 55, r. 1)

(1) Subject to paragraphs (2) and (4), this Order shall apply to every appeal which under any written law lies to the High Court from any court, tribunal or person.

(2) This Order shall not apply to an appeal from a Subordinate Court constituted under the Subordinate Courts Act[221] (Chapter 321) or any application by case stated.

[220] Formerly known as an "order absolute"

[221] Note the Subordinate Courts have since been renamed as the State Courts

(3) Rules 2 to 7 shall, in relation to an appeal to which the Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or under any written law.

(4) In this Order, references to a tribunal shall be construed as references to any tribunal constituted under any written law other than any of the ordinary courts of law.

Order 59. Costs

Interpretation (O. 59, r. 1)

(2) In this Order —
"costs" includes fees, charges, disbursements, expenses and remuneration;

Special matters to be taken into account in exercising discretion (O. 59, r. 5)

The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account any payment of money into Court and the amount of such payment and the conduct of all the parties, including conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

When a party may sign judgment for costs without an order (O. 59, r. 10)

(1) Where —

(a) a plaintiff by notice in writing and without leave either wholly discontinues his action against any defendant or withdraws any particular claim made by him therein against any defendant; or

(b) an action, a cause or matter is deemed discontinued,

the defendant may, unless the Court otherwise orders, tax his costs of the action, cause or matter and if the taxed costs are not paid within 4 days after taxation, may sign judgment for them. The reference to a defendant in this paragraph shall be construed as a reference to the person (howsoever described) who is in the position of defendant in the proceeding in question, including a proceeding on a counterclaim.

(2) If a plaintiff accepts money paid into Court in satisfaction of the cause of action, or all the causes of action, in respect of which he claims, or if he accepts a sum or sums paid in respect of one or more specified causes of action and gives notice that he abandons the others, then subject to paragraph (4), he may, after 4 days from payment out and unless the Court otherwise orders, tax his costs incurred to the time of receipt of the notice of payment into Court and 48 hours after taxation may sign judgment for his taxed costs.

(3) Where a plaintiff in an action for libel or slander against several defendants sued jointly accepts money paid into Court by one of the defendants, he may, subject to paragraph (4), tax his costs and sign judgment for them against that defendant in accordance with paragraph (2).

(4) Where money paid into Court in an action is accepted by the plaintiff after the trial or hearing has begun, the plaintiff shall not be entitled to tax his costs under paragraph (2) or (3).

(5) When an appeal is deemed to have been withdrawn under Order 55D or Order 57 —

(a) the respondent may tax his costs of and incidental to the appeal, and, if the taxed costs are not paid within 4 days after taxation, may sign judgment for them; and

(b) any sum of money lodged in Court as security for the costs of the appeal shall be paid out to the respondent towards satisfaction of the judgment for taxed costs without an order of the Court and the balance, if any, shall be paid to the appellant.

Basis of taxation (O. 59, r. 27)

(1) Subject to the other provisions of these Rules, the amount of costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where —

(a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings;

(b) an order is made for the payment of costs out of any fund; or

(c) no order for costs is required, unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.

(2) On a taxation of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules, the term ''the standard basis'', in relation to the taxation of costs, shall be construed accordingly.

(3) On a taxation on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term ''the indemnity basis'', in relation to the taxation of costs, shall be construed accordingly.

(4) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on any basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis.

(5) Notwithstanding paragraphs (1) to (4), if any action is brought in the High Court, which would have been within the jurisdiction of a Subordinate Court, the plaintiff shall not be entitled to any more costs than he would have been entitled to if the proceedings had been brought in a Subordinate Court, unless in any such action a Judge certifies that there was sufficient reason for bringing the action in the High Court.

	Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang **[2014] 2 SLR 191 [2014] SGCA 3**
Holding	• Held that the travel expenses incurred by the respondent were both reasonable and reasonably incurred. The quantum of these expenses was proportionate when considered on an item by item basis as well as in the aggregate, [22]. • An assessment of costs requires consideration to be given to all

	facts and circumstances. [33] "The issue of costs is fundamentally a matter of assessment based on the entire myriad of relevant facts and circumstances. It is not, and can never be, a precise science. To lay down a general rule that costs must be mathematically and precisely pegged to the final apportionment of liability, would fail to ensure justice in each case. It is for this reason that the legal framework in O 59 of the ROC as interpreted by this court in *Lin Jian Wei* requires due consideration to be given to all the relevant facts and circumstances."
Summary of facts	The respondent, a Chinese foreign worker employed by the appellant, was injured in the course of his work in July 2010. He commenced an action against the appellant in February 2011 seeking compensation. In the meantime, as the respondent was unable to work and maintain his Singapore work pass, he returned to China. Some time in July 2011, he flew back to Singapore for the purpose of attending and giving evidence at the trial. On 25 July 2011, which was the very first day of the trial, the parties reached a settlement. The appellant agreed to bear 80% liability. Final judgment was entered against the appellant for damages of $75,000, and costs and disbursements to be agreed or taxed. The parties later agreed on the costs due to the respondent but they were unable to agree on the disbursements. The appellant took issue with the respondent's claim for travel expenses of $1,208. Out of this, a sum of $1,113 was for the respondent's return air tickets for travel between Shanghai and Singapore and the remainder of $95 was for land transport expenses incurred in China to travel to and from the airport. The appellant did not dispute that the itemised amounts were reasonable. The appellant's case was that it was not obliged to pay these expenses as a matter of legal principle. The respondent eventually filed an application for the taxation of the disbursements.

	Lin Jian Wei and another v Lim Eng Hock Peter **[2011] SGCA 29 [2011] 3 SLR 1052**
Holding	• By O 59 r 27(2) and para 1(2) of Appendix 1, costs are in the discretion of the court, however this discretion is not unfettered [56] "in assessing whether costs incurred are reasonable, it needs to be shown that the costs incurred were not just reasonable and necessary for the disposal of the matter, but also, in the entire context of that matter, proportionately incurred" • Clarified that proportionality should be considered both on an item by item basis and on a global basis [78] "The approach that should be adopted in taxation is that the Court should first assess the relative complexity of the matter, the work supposedly done against what was reasonably required

	in the prevailing circumstances, the reasonableness and proportionality of the amounts claimed on an item by item basis and thereafter, assess the proportionality of the resulting aggregate costs. In this exercise, all the Appendix 1 considerations are relevant. In the general scheme of things, no single consideration ordinarily ought to take precedence. In every matter, this calls for careful judgment by reference to existing precedents and guidelines. A taxing officer should consider the complexity of the issues of fact and law which arose in the matter against the backdrop of the statements as to the amount of time spent by the solicitors and also the seniority of the counsel involved in order to determine whether the costs claimed for the amount of time spent is reasonable and proportionate. […]"
Summary of facts	Facts of the case are not particularly relevant to our manual.

Miscellaneous (Appendix 2, Part III.) [from *Rules of Court,* O 55]

3. Where a plaintiff or defendant signs judgment for costs under Rule 10, there shall be allowed the following costs, in addition to disbursements:

	Costs to be allowed		
	High Court	*District Court*	*Magistrate's Court*
Costs of judgment	$300	$300	$200

4. Where upon the application of any person who has obtained a judgment or order against a debtor for the recovery or payment of money, a garnishee order is made under Order 49, Rule 1 against a garnishee attaching debts due or accruing due from him to the debtor, there shall be allowed the following costs, in addition to disbursements:

(*a*) to the garnishee, to be deducted by him from any debt owing by him as aforesaid before payments to the applicant —

If no affidavit used			***If affidavit used***		
High Court	*District Court*	*Magistrate's Court*	*High Court*	*District Court*	*Magistrate's Court*
$150	$150	$150	$300	$300	$300

(*b*) to the applicant, to be retained, unless the Court otherwise orders, out of the money recovered by him under the garnishee order and in priority to the amount of the debt owing to him under the judgment or order —

Costs to be allowed		
High Court	*District Court*	*Magistrate's Court*
$750	$750	$600

Order 60. The Registry

Filing of instruments creating powers of attorney (O. 60, r. 6)

(1) An instrument creating a power of attorney which is presented for deposit in the Registry of the Supreme Court under —

(a) section 27 of the Trustees Act (Chapter 337); or

(b) section 48 of the Conveyancing and Law of Property Act (Chapter 61), shall not be deposited therein unless the execution of the instrument has been verified in accordance with Rule 7 and the instrument is accompanied —

(i) except where Rule 7 (b) applies, by the affidavit, declaration, certificate or other evidence by which the execution was verified;

(ii) in the case of an instrument presented for filing under section 27 of the Trustees Act (Chapter 337), by the statutory declaration required by subsection (4) of that section.

(2) Without prejudice to section 48 of the Conveyancing and Law of Property Act (Chapter 61), a certified copy of an instrument creating a power of attorney which is presented for deposit in the Registry of the Supreme Court under that section shall not be deposited therein unless —

(a) the execution of the instrument has been verified in accordance with Rule 7;

(b) the signature of the person who verified the copy is sufficiently verified; and

(c) except where Rule 7 (b) applies and subject to paragraph (3), the copy is accompanied by the affidavit, declaration, certificate or other evidence by which the execution was verified.

(3) If the affidavit, declaration, certificate or other evidence verifying the execution of the instrument is so bound up with or attached to the instrument that they cannot conveniently be separated, it shall be sufficient for the purpose of paragraph (2) to produce and show to the proper officer in the Registry the original affidavit, declaration, certificate or other evidence and to file a certified or office copy thereof.

Verification of execution of power of attorney (O. 60, r. 7)

The execution of such an instrument or statutory declaration as is referred to in Rule 6 (1) may be verified —

(a) by an affidavit or statutory declaration sworn or made by the attesting witness or some other person in whose presence the instrument was executed, or, if no such person is available, by some impartial person who knows the signature of the donor of the power of attorney created by the instrument;

(b) if the instrument was attested by a Commissioner for Oaths, by the signature of the Commissioner as attesting witness; or

(c) by such other evidence as, in the opinion of the Registrar is sufficient.

Inspection, etc., of powers of attorney (O. 60, r. 8)

(1) An index shall be kept in the Registry of the Supreme Court of all instruments and certified copies to which Rule 6 relates deposited in the said Registry and of the names of the donors of the powers of attorney created by such instruments.

(2) Any person shall, on payment of the prescribed fee, be entitled —

(a) to search the index;

(b) to inspect any document filed or deposited in the Registry in accordance with Rule 6; and

(c) to be supplied with an office copy of such document; and a copy of any such document may be presented at the Registry to be marked as an office copy

XI. *State Courts Act* (Cap 321, 2007 Rev Ed Sing)

Section 15. Powers and duties of certain State Court officers

The bailiffs and process servers shall —

(a)execute all writs, summonses, warrants, orders, notices and other mandatory processes of the State Courts given to them; (b) make a return of the same together with the manner of the execution thereof to the court from which the process issued; and

(c) arrest and receive all such persons and property as are committed to the custody of the State Courts.

Section 15A. Solicitor, etc., authorised to act as bailiff

(1) Subject to such directions as may be given by the Presiding Judge of the State Courts, the registrar may authorise a solicitor or a person employed by a solicitor to exercise the powers and perform the duties of a bailiff during such period or on such occasion as the registrar thinks fit and subject to such terms and conditions as the registrar may determine.

(2) Section 68(2) shall apply to a solicitor or person authorised under subsection (1) as it applies to an officer of a State Court.

Section 16. Special powers of bailiffs

The bailiffs in executing any writ of seizure and sale or any other writ of execution or of distress may effect an entry into any building, and for that purpose, if necessary, may break open any outer or inner door or window of the building or any receptacle therein, using such force as is reasonably necessary to effect an entry.

XII. *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing)

Section 13. Writs of execution

A judgment of the High Court for the payment of money to any person or into court may be enforced by a writ, to be called a writ of seizure and sale, under which all the property, movable or immovable, of whatever description, of a judgment debtor may be seized, except —

(a) the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, when the value of such apparel, bedding, tools and implements does not exceed $1,000;

(b) tools of artisans, and, where the judgment debtor is an agriculturist, his implements of husbandry and such animals and seed-grain or produce as may in the opinion of the court be necessary to enable him to earn his livelihood as such;

(c) the wages or salary of the judgment debtor;

(d) any pension, gratuity or allowance granted by the Government; and

(e) the share of the judgment debtor in a partnership, as to which the judgment creditor is entitled to proceed to obtain a charge under any provision of any written law relating to partnership.

	American Express Bank Ltd v Abdul Manaff bin Ahmad **[2003] 4 SLR 780**
Holding	• The court decided that s 13(c) of the SCJA is applicable to the garnishee process, and therefore, wages and salaries cannot be garnished.
Summary of facts	Appeals against the High Court decision that the wages or salaries of judgment debtors may be garnished.

XIII. *Work Injury Compensation Act* (Cap 354, 2009 Rev Ed Sing)

Section 2A. Appointment of Assistant Commissioners, investigation officers and authorised persons

(1) The Commissioner may appoint such number of public officers as Assistant Commissioners (Work Injury Compensation) and investigation officers and such persons as authorised persons, as may be necessary to assist the Commissioner in the administration of this Act.

(2) The Commissioner may delegate the exercise of all or any of the powers conferred or duties imposed upon him by this Act (except the power of delegation conferred by this subsection) to any Assistant Commissioner, investigation officer or authorised person, subject to such conditions or limitations as the Commissioner may specify.

Section 3. Employer's liability for compensation

(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to an employee, his employer shall be liable to pay compensation in accordance with the provisions of this Act.

(2) An accident happening to an employee while he is, with the express or implied permission of his employer, travelling as a passenger by any means of transport to or from his place of work shall be deemed to arise out of and in the course of his employment if at the time of the accident the means of transport is being operated by or on behalf of his employer or by some other person by whom it is operated in pursuance of arrangements made with his employer and is not being operated in the ordinary course of a public transport service.

(3) An accident happening to an employee in or about any premises at which he is for the time being employed for the purposes of his employer's trade or business shall be deemed to arise out of and in the course of his employment if it happens while he is taking steps, on an actual or supposed emergency at those premises, to rescue or protect persons who are, or are thought to be or possibly to be injured or imperilled, or to avert or minimise damage or loss to property.

(4) An accident happening to an employee shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the time of the accident acting in contravention of any written law or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if —

> (a) the accident would have been deemed so to have arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and
>
> (b) such act was done for the purposes of and in connection with the employer's trade or business.

(5) An employer shall not be liable to pay compensation in respect of —

> (a) any injury to an employee resulting from an accident if it is proved that the injury to the employee is directly attributable to the employee having been at the time thereof under the influence of alcohol or a drug not prescribed by a medical practitioner;
>
> (b) any incapacity or death resulting from a deliberate self-injury or the deliberate aggravation of an accidental injury; or
>
> (c) any injury to an employee suffered in a fight or an attempted assault on one or more persons unless —

(i) the employee did not assault or attempt to assault any other person in the fight or attempted assault, or did assault any such person in the exercise of the right of private defence in accordance with sections 97 to 106 of the Penal Code (Cap. 224); or

(ii) the employee was, at the time when the injury was received, breaking up or preventing the fight or assault, or in the course of safeguarding life or any property of any person or maintaining law and order, under any instruction or with the consent (whether express or implied) of his employer or a principal referred to in section 17.

(5A) In this section, "drug" means —

(a) controlled drug within the meaning of the Misuse of Drugs Act (Cap. 185); or

(b) a prescription only drug specified for the purposes of section 29 of the Medicines Act (Cap. 176) that is not prescribed by a medical practitioner for the employee's consumption or use.

(6) For the purposes of this Act, an accident arising in the course of an employee's employment shall be deemed, in the absence of evidence to the contrary, to have arisen out of that employment.

Section 11. Notice and claim

(1) Except as provided in this section, proceedings for the recovery of compensation for an injury under this Act shall not be maintainable unless —

(a) notice of the accident has been given to the employer by or on behalf of the employee as soon as practicable after the happening thereof;

(b) a claim for compensation with respect to that accident has been made within one year from the happening of the accident causing the injury, or, in the case of death, within one year from the date of the death; and

(c) the claim has been made in such form and manner as the Commissioner may determine.

(2) No notice to the employer shall be necessary where a fatal accident has occurred.

(3) The want of or any defect or inaccuracy in a notice shall not be a bar to the maintenance of proceedings if —

(a) the employer is proved to have had knowledge of the accident from any other source at or about the time of the accident; or

(b) it is found in the proceedings for settling the claim that the employer is not, or would not be, if a notice or an amended notice were then given and the hearing postponed, prejudiced in his defence by the want, defect or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake, absence from Singapore or other reasonable cause.

(4) Subject to subsection (4A), the making of a claim after the lapse of the period specified in subsection (1) shall not be a bar to the maintenance of proceedings if it is found that the delay was occasioned by mistake, absence from Singapore or other reasonable cause.

(4A) The making of a claim after the lapse of the period specified in subsection (1) shall be a bar to the maintenance of proceedings in respect of an accident if it is found that the delay was occasioned by the claimant having instituted an action for damages in any court for compensation with respect to that accident if —

(a) the accident occurs on or after the date of commencement of the Work Injury Compensation (Amendment) Act 2011 (referred to in this subsection as the appointed day); or

(b) the accident occurred before the appointed day, and the claim is made after the expiry of the period of 12 months beginning on the appointed day.

(4B) For the purposes of subsections (4) and (4A), it is immaterial whether there were any previous claims made in respect of that accident.

(5) Notice to the employer (or, if there is more than one employer, to one of such employers) in respect of an injury may be given either in writing or orally or to the foreman or other person under whose supervision the employee was employed, or to any person designated for the purpose by the employer, and shall state in ordinary language the cause of the injury and the date on which and the place at which the accident happened.

(6) The notice if in writing may be given by delivering the notice at, or sending it by registered post addressed to, the residence or place of business of the person to whom it is to be given.

Section 29. Appeal from decision of Commissioner

(1) Subject to section 24(3B), any person aggrieved by any order of the Commissioner made under this Act may appeal to the High Court whose decision shall be final.

(2) The procedure governing any such appeal to the High Court shall be as provided for in the Rules of Court.

(2A) No appeal shall lie against any order unless a substantial question of law is involved in the appeal and the amount in dispute is not less than $1,000.

(3) Notwithstanding any appeal under this section, the employer shall deposit with the Commissioner the amount of compensation ordered by the Commissioner under section 25A, 25B, 25C or 25D within 21 days from the date of the Commissioner's decision, and the deposit shall be held by the Commissioner pending the outcome of the appeal.

	Kee Yau Chong v S H Interdeco Pte Ltd **[2014] 1 SLR 189**
Holding	● With regards to s 29(2A) of WICA, the court noted that the requirement of a *substantial* question of law means that it is "not enough for there to be a mere question of law or that the Court takes the view that a different interpretation of the facts could have been drawn". [15]: "As can be seen, it is necessary (but insufficient) for there to be a "substantial question of law" before an appeal against an order made by the learned Assistant Commissioner will avail

	itself to "any person aggrieved" by such order. In deciding whether the requirements for an appeal against an order made by the learned Assistant Commissioner have been met, it is not enough for there to be a *mere* question of law or that the Court takes the view that a *different interpretation of the facts* could have been drawn. Only a *substantial* question of law will suffice."
Summary of facts	Appeal against the labour court's dismissal of the claimant's claim on the grounds that no "accident" had taken place within the meaning of WICA.

	Pang Chew Kim v Wartsila Singapore Pte Ltd **[2012] 1 SLR 15**
Holding	• With regards to s 29(2A) of WICA, the court noted the range of errors of law that may provide grounds for appeal. [19]: "In determining the range of errors of law that may provide grounds for appeal under s 29(2A), the courts have accepted the full range of errors of law listed in *Halsbury's Laws of England* vol 1(1) (Butterworths, 4th Ed Reissue, 1989) at para 70:... misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof." [21]: "While the court will not generally disturb findings of facts unless they are such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination upon appeal" (*Karuppiah* at [13]), there is no similar rule precluding courts from assessing the robustness of inferences drawn from the facts as found by the Commissioner."
Summary of facts	Appeal against the labour court judgment on the interpretation of s3 of WICA.

Section 33. Limitation of employee's right of action

(1) Nothing in this Act shall be deemed to confer any right to compensation on an employee in respect of any injury if he has instituted an action for damages in respect of that injury in any

court against his employer or if he has recovered damages in respect of that injury in any court from his employer.

(2) Subject to subsections (2A) and (2B), no action for damages shall be maintainable in any court by an employee against his employer in respect of any injury by accident arising out of and in the course of employment —

(a) if he has a claim for compensation for that injury under the provisions of this Act and does not withdraw his claim within a period of 28 days after the service of the notice of assessment of compensation in respect of that claim;

(b) if he and his employer have agreed or are deemed to have agreed to the notice of assessment under section 24(2)(a) for that injury; or

(c) if he has recovered damages in respect of the injury in any court from any other person.

(2A) Where —

(a) a claim for compensation under this Act is made for an employee's injury by accident arising out of and in the course of the employment;

(b) there is no objection by the employee to the notice of assessment of compensation in respect of that claim;

(c) the compensation ordered by the Commissioner thereafter in respect of that claim is of a lesser amount than that stated in that notice of assessment of compensation in respect of that claim;

(d) within a period of 28 days after the making of the order, the employee notifies the Commissioner and the employer in writing that he does not accept the compensation so ordered, and has not received or retained any part of such compensation earlier paid (if any) by the employer; and

(e) no appeal under section 29 is made against the order, the employee may institute an action in any court against his employer for damages in respect of that injury and any order made by the Commissioner in respect of that injury shall be void.

(2B) Where —

(a) the Commissioner assesses or makes an order that no compensation shall be payable for a claim for compensation for an employee's injury by accident arising out of and in the course of employment because —

(i) the injury did not arise out of and in the course of the employee's employment; or

(ii) the injured person is not an employee within the meaning of this Act; or

(b) an appeal to the High Court under section 29 from an order made by the Commissioner has failed because of any reason mentioned in paragraph (a)(i) or (ii), the employee may institute an action in any court to recover damages independently of this Act for injury caused by that accident.

(3) If an action is brought within the time specified in section 11 in any court to recover damages independently of this Act for injury caused by any accident and it is determined in the action or on appeal that the injury is one for which the employer is not liable but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but

the court shall, if the employee so chooses, proceed to assess the compensation and may deduct therefrom all or any part of the costs which, in its judgment, have been caused by the employee instituting the action instead of proceeding under this Act.

(4) In any proceedings under subsection (3) when the court assesses the compensation, it shall give a certificate of the compensation it has awarded and the direction it has given, if any, as to the deduction of costs and such certificate shall have the same effect as a judgment of the court.

	Yang Dan v Xian De Lai Shanghai Cuisine Pte Ltd Ltd **[2010] SGHC 346. [2011] 2 SLR 379.**
Holding	● Appeal should be allowed because the respondent did not withdraw his Compensation Claim before the order of 7 May 2008 was made. ● The correct interpretation of s 33(2)(a) WCA is that a workman may proceed with a General Law Claim even after the Commissioner has assessed that zero compensation is payable on his Compensation Claim **provided that he first withdraws his Compensation Claim.** (emphasis added) [57]: "(a) Under s 24(3) WCA, the Commissioner's assessment becomes a Deemed Order if there is no objection thereto within two weeks of the service of the notice of assessment. Section 25(1) WCA refers to a period of 14 days to do so which is the same as the two week period. Once there is a Deemed Order, it is then, in my view, too late for the workman to withdraw his Compensation Claim. In this regard, while the District Judge said that the consequence of a failure to object within the relevant time frame is that the workman loses his right to a hearing and cannot appeal (see Yang Dan at [32]) it is important to bear in mind that a further consequence of a failure to object within the relevant time frame is that the assessment becomes a Deemed Order." "b) If however there is an objection to the assessment within the relevant time frame, the assessment does not become a Deemed Order. The workman's right to withdraw his Compensation Claim and proceed with a General Law Claim continues for the time being even if he was not the one who had objected to the assessment." ● However, once an order has been made on the Compensation Claim, the "workman" may no longer withdraw his Compensation Claim to pursue a General Law Claim. [57]: "(c) If there is a pre-hearing conference and an agreement is reached to settle all matters for hearing in that conference, the Commissioner may record a Settlement Order. At that point, the workman will lose his right to withdraw his Compensation Claim and proceed with a General Law Claim." "(d) If the workman does not agree to a settlement of all matters at

	the pre-hearing conference, the workman's right to withdraw continues for the time being. However, after the Compensation Claim proceeds to a hearing and the Commissioner makes a Post-hearing Order, it will be too late for the workman to withdraw his Compensation Claim or to proceed with a General Law Claim."
Summary of facts	Appeal against the interpretation of s 33(2), s 33(2A) and s 33(2B) The respondent, Yang Dan, having previously received an assessment of zero incapacity in his WICA Claim, subsequently attempted to make a General Law Claim.

FOURTH SCHEDULE [from *WICA*]

Classes of persons not covered

1. Any member of the Singapore Armed Forces.

2. Any officer of the Singapore Police Force, the Singapore Civil Defence Force, the Central Narcotics Bureau or the Singapore Prisons Service.

3. A domestic worker, being any person employed in or in connection with the domestic services of any private premises.

Chapter 4:

Finding Local Partners

by Douglas MacLean, Justice Without Borders

CHAPTER 4: FINDING LOCAL PARTNERS

1. FINDING A PARTNER WHEN THE CLIENT LEAVES SINGAPORE

1.1 This chapter explains the logistics and challenges involved in finding and working with local partners in the client's home community. Partners are indispensable to ensuring the client remains in contact and can see their Singapore-based claims through to completion.

1.2 This chapter is thus divided into eight sections. Section 1 provides a brief overview of the importance of finding a local partner, Section 2 describes the major challenges involved in remote representation, Section 3 provides an overview of how local partners can support remote representation, Section 4 discusses preparations needed for remote representation, Section 5 describes how to find a partner in the client's home country, Section 6 introduces the mechanics and considerations in forming a partnership with another entity, Section 7 discusses how practitioners in clients' home communities may attempt to seek legal assistance in Singapore, and Section 8 closes with an overview of how to assess the viability of a client's claims for remote representation.

1.3 Pursuing a legal claim from abroad is difficult. Even when the law, as in Singapore, enables clients to pursue claims remotely, the logistical hurdles often prove very challenging for both the lawyer and the client. This is particularly true for migrant workers, who generally must rely upon pro bono representation, are often busy attempting to find work, may not be fluent in their lawyer's language(s) and may live in remote areas where reliable telecommunications are scarce.

1.4 A local lawyer, direct service organisation,[1] or other individual or organisation who can serve as a reliable liaison or partner for the Singaporean lawyer in the client's community can help to overcome some of these barriers. This chapter discusses how local partners can meet Singaporean lawyers' specific needs during the litigation, how to find potential partners, and the legal considerations in partnering with another individual or entity.

1.5 For readers in the client's home country who believe their client may have a viable legal claim in Singapore, please see Section 7 for methods of finding legal aid in Singapore.

[1] Direct service organisations are generally community organisations that provide social services directly to a client population. This can include legal consultations, medical care, counselling, job training, and other such services.

2. MAJOR CHALLENGES IN REMOTE REPRESENTATION

2.1. Singaporean service providers and pro bono lawyers have reported that clients who have suffered labour exploitation or even human trafficking are unlikely to bring claims if they believe they cannot stay in Singapore long enough to conclude the claim. As explained in Chapter 3,[2] there is no legal residency status available to those who seek civil damages against their employers or against a Singaporean agency. The only alternative is the Ministry of Manpower's (MOM) dispute resolution and adjudication processes. These can take months, during which time the client may well remain unemployed. Faced with financial pressures, the client is much more likely to accept an unfair settlement or forego complaint procedures entirely. For those who attempt to pursue civil claims after return, the simple logistical barriers can be enough to bring the legal claim to a halt. Below are four of the most common issues that lawyers and clients face in remote representation.

I. Telecommunication challenges

2.2. Unfortunately, maintaining contact with a client post-return can be immensely challenging. Internet telecommunications such as Skype are often unreliable, causing frustration when calls are repeatedly dropped. Phone calls can be expensive, and when the client lives in a more remote area, telecommunications may be poor or nonexistent. Finally, clients may move within their own country, or change cell phone numbers, complicating continued contact. The latter has been reported amongst Indonesian clients, as new phone numbers are inexpensive to obtain in Indonesia.

II. Language barriers

2.3. Lack of fluency in the lawyer's spoken language can make communication particularly difficult, and again give rise to frustration. Miscommunication can result in clients missing important deadlines, providing the wrong materials, or simply becoming confused about the state of their claim and/or the nature of the decisions that they as clients must make. Clients may also misunderstand their chances of success or of the pace of process, becoming impatient with or even distrusting their lawyer. Facing other responsibilities and challenges in their own lives, these frustrations may compel clients to simply drop the case.

III. Cultural differences and lack of understanding about the legal process

2.4. Many clients are unlikely to have had much experience with legal systems in the past, or perhaps have had a negative experience. Their own country's legal system may be quite different and/or vulnerable to corruption, causing the client to distrust the Singaporean legal system as well. Like most non-lawyers, clients

[2] See Chapter 3 Section 3.IV.

are also generally unaware of the processes required to pursue a claim and collect a judgment, let alone the amount of time such tasks will require. Compounded with language barriers, clients may not have a full understanding of the legal process, leading to frustration when this process fails to produce results.

IV. Time and availability

2.5. Finally, clients may have irregular schedules when they return home, making regular meetings particularly challenging. Missed appointments can become the norm, forcing the Singaporean advocate to expend time and resources following up with the client by phone and e-mail.

3. HOW A LOCAL PARTNER CAN SUPPORT REMOTE REPRESENTATION

3.1. A reliable local partner can help take on many of the burdens of case management that clients are ill-equipped to handle. Partners are often direct service providers, pro bono lawyers, or university legal clinics in the client's place of residence. The following subsections explain the advantages of having a local partner, as well as the different types of partners generally available.

3.2. For those with clients from Indonesia, the Philippines or Thailand, contact Justice Without Borders for a free consultation in locating a partner in these countries.

I. Advantages of having a local partner

3.3. Face-to-face communication is vital for many clients, and local partners provide an immediate point of contact for their case. Clients are also more likely to trust someone they can meet directly, who speaks their language, and who understands their culture. For Singaporean lawyers, a local partner can not only translate case updates into the client's language, but she can explain it in a way that is easier to understand and culturally appropriate. Most importantly, a local partner can work with the client's schedule, following up with them in person as needed.

3.4. Additionally, local partners are more likely to have a higher level understanding of general legal principles, as well as issues specific to migrant workers. While Singaporean advocates will need to explain legal and logistical issues that are unique to the Singaporean legal system, their more specialised grounding makes communication between practitioners easier. Finally, local partners are in a better position to collect needed evidence and testimony, and can help arrange teleconferences as needed.

II. Legal, paralegal, and non-law practitioners as partners

3.5. While a Singapore-licensed attorney is generally required to meet clients' legal needs within Singapore, home country support usually does not actually require the help of a licensed attorney. While local lawyers can certainly be very valuable partners, most of the needs of the Singaporean lawyer can be met by using paralegals (such as caseworkers with some practical background in legal matters) or even properly trained non-legal partners.

3.6. Note that different countries have different licensing requirements for conducting law-related activities. This manual's focus on remedies within the Singaporean jurisdiction means that activities carried out in the client's home country will generally be unrelated to local legal processes. However, practitioners should confirm that activities such as evidence collection and taking depositions do not require a specific license in the client's home country. Finally, if clients decide to bring suit against local employment agents or brokers in their home countries, a locally-licensed attorney will be necessary.

4. PREPARING FOR REMOTE REPRESENTATION

I. For clients who have not yet left Singapore

4.1. Lawyers should conduct as much case preparation as possible prior to the client's departure. While each case will have slightly different tasks, practitioners should attempt to complete the items mentioned below before the client leaves Singapore:

A. Obtain relevant contact information in the client's destination

4.2. Practitioners should obtain as much information as possible from the client to ensure that they may keep in contact. Such information can include:

1) Local cell phone number(s)
2) E-mail address(es)
3) Next physical address
4) Address and phone number for family members
5) Notification of any plans to move within their home country or to migrate again
6) Contact information for a friend in Singapore as a backup

B. Explain and provide a written copy of the expected next steps and overall course of the litigation. Include next steps and a scheduled time to talk once the client has returned home.

4.3. A full consultation prior to the client's departure is essential to preparing her for the challenges of remote representation. Practitioners should fully explain the course of the negotiations or litigation as it stands at that time. Where possible, written copies of the same information should be provided in both English and the client's home language. These documents will also be essential for partners

in the client's home country, and preparing them in advance will smooth the process of building a good working relationship. Finally, clients should have a concrete understanding of what they must do when they return home, even if that only involves contacting their lawyer for a follow-up. While clients may require flexibility in scheduling their first meeting post-return, setting an initial date and time to follow up will help to maintain a sense of momentum and keep the client involved in the case.

C. Complete procedures that require the client's presence

4.4. While remedies via the MOM route become unavailable once the client leaves Singapore, civil claims only require the client's presence under certain conditions. The following table broadly outlines the minimum amount of work that must be done in order to successfully continue (or postpone) a case after the client departs Singapore. For complete details on civil processes, please see Chapter 3. Note that in all cases, the client should sign a power of attorney agreement[3] authorizing the lawyer to accomplish whatever next steps will be needed following the client's return.

Table 1: Legal remedy procedures and necessary preparation while client is in Singapore

Type of procedure	Necessary work while in Singapore
MOM adjudication procedures	Client *must* remain in Singapore until adjudication is finalized or until a settlement is entered. **Mediation or adjudication cannot be continued after leaving Singapore.**
Worker's injury claim under WICA	Client must usually obtain a medical certificate from a licensed Singaporean hospital [4] Power of attorney should also be signed and filed.
Civil claim—Contract, tort, or Employment Act, etc.	**None**. However, all relevant evidence the client holds should be collected, photocopied (one copy for client), and documented. Power of attorney should also be signed and filed. **Note that the client may pursue only MOM claims or civil claims, not both. See Chapter 3.**
Enforcing a judgment	**None**. Appropriate power of attorney should also be signed and filed.

[3] See Chapter 3 Section 4.II.D for more information.

[4] See Chapter 2 Section 5.20.

II. For clients who are or have already returned home.

4.5. Clients who cannot remain in Singapore fall under several categories, but together have similar needs, which are explained below. Types of clients under this category include: clients who must immediately leave Singapore and those who first contact a Singaporean lawyer from abroad.

A. Clients in Singapore who must return immediately

4.6. Some clients may be forced to leave Singapore before practitioners can complete either MOM adjudication, a WICA claim or filing a civil claim, as described in the previous table. Establishing and maintaining contact is paramount to continuing representation, and practitioners should work quickly to inform the client of immediate next steps and to establish a regular meeting schedule. While the client is ultimately responsible for maintaining contact, the lawyer must be cognizant of the challenges that clients face in doing so. A clear set of next steps and an initial calling schedule will provide both structure and momentum for both the client and the lawyer.

B. Potential clients who make first contact from abroad

4.7. In some cases, initial contact with a lawyer may occur after a worker has returned to their home country. Although currently a rare occurrence, direct service organisations in Indonesia, the Philippines, and elsewhere are increasingly working with counterparts in host countries like Singapore to establish lines of communication so that workers with potentially viable legal claims can attempt to seek legal remedies in the host country even after they return home.

4.8. In most such cases, Singaporean lawyers will first be contacted by a direct service or legal aid organisation in the client's home country. This organisation may either act only as a referral agency or as the lawyer's partner in bringing the case. Practitioners should first confirm whether the organisation has the capacity and willingness to continue as a liaison with the client should the lawyer agree to take the case.

4.9. In cases where a potential client makes contact with a Singaporean practitioner via a local organisation, the practitioner should first assess the extent to which that organisation is willing to continue serving as a liaison. Lawyers should be prepared to fully explain both what the partner organisation would be asked to do in the near term, and to give an idea of the duration and level of support needed should civil litigation proceed.

5. AVENUES TO FINDING A PARTNERING ORGANISATION IN THE CLIENT'S HOME COUNTRY

5.1. This section describes some of the potential organisations in clients' home countries that lawyers in Singapore may be able to approach as partners and liaisons after the client has returned home. These are not listed in any particular order, and the benefits and drawbacks to working with each group will be explored.

5.2. Note that the best potential partners are very likely to vary from location to location. It may well take approaching several of the entities listed below before an appropriate partner is identified. Lawyers should thus investigate which entities seem the most appropriate, given the client's geographic point of return, and approach them first.

5.3. Finding a partner in the client's home country can be the most challenging step in the representation. Clients who move to large urban areas will likely have multiple options, while those who move to more remote areas may have none and must settle for a liaison some distance away in a larger town. Where possible, clients should be encouraged to help find an appropriate partner, as their relationship with the local partner is as important as that between the partner and the practitioner.

5.4. In many cases, practitioners' first points of contact in the client's home country may simply lead to referrals, either in the same city where the client lives or hopefully somewhere nearby. International and national organisations in the home country may be able to help in locating an appropriate partner within their own professional networks.

5.5. Those seeking partners in Indonesia, the Philippines, or Thailand, can contact Justice Without Borders for a free consultation in locating partners.

5.6. For practitioners who have no contacts within a client's home country, the following entities can serve as productive first points of contact:

I. National bar associations

5.7. These organisations are likely to have the largest directory of legal partners in a given country. Unfortunately, pro bono services within the bar association may be minimal or non-existent, with many lawyers refusing to take cases without compensation. Another crucial disadvantage in finding a local attorney is that it can be quite difficult to vet them. Bar associations usually include both lawyers who represent labour interests and those who serve employers and brokers. Without the ability to properly vet the attorney, practitioners run the risk of engaging a local partner who could actively work against the client's interests. Thus, it is important to obtain references from other credible sources for any lawyer contacted through a national bar association.

5.8. Pro bono directories may be a safer alternative, but not all bar associations keep such lists. Where they do, practitioners will need to find and vet lawyers who live near the client and who express interest in assisting the case.

II. Law faculty (legal clinics)

5.9. Many home country universities now house pro bono or reduced fee legal clinics to serve the local community.

5.10. The major advantage of working with a law faculty partner is that the law students frequently have better command of at least written English, and are often enthusiastic to help. Where clients have returned to their home community, they may well be more trusting of working with faculty and students who are from their community as well. Note that students may require additional training and supervision, so it is vital to ensure that the supervising clinical staff are fully informed and understand the scope and details of the work.

5.11. A key disadvantage is that migrant worker-focused legal clinics are still relatively rare, and in some countries, even legal scholars who are familiar with labour migration can be difficult to find. That said, it may be worth contacting a law faculty closest to the client to learn whether a staff member may be willing to help (and bring in student volunteers in the process) or may be able to provide a reference to someone in the common who can serve as a liaison.

III. Community-based and non-governmental organisations (CBOs and NGOs)

5.12. Most partners are likely to be local direct service organisations. These can be divided between local legal aid organisations, organisations with paralegals (i.e. trained caseworkers who are not licensed attorneys), and organisations without paralegal staff. While all three types of organisations may be able to provide sufficient assistance, Singaporean lawyers will need to fully discuss the intended scope of the partnership to ensure that the organisation has sufficient capacity to undertake both the technical and non-technical aspects of the casework.

5.13. Additionally, these organisations should be vetted to ensure that they are known entities, particularly in the field in which they work. Although support from international organisations is often a good indicator of credibility, smaller organisations that have been vetted by national level NGOs or other entities can also be appropriate. Practitioners serving clients living in remote areas may have few choices, and may need to adjust their expectations accordingly. **However, where an organisation is unknown, or there is any suspicion that the organisation is unreliable or seems otherwise suspicious, lawyers should opt instead for a reliable organisation more distant from the client.**

IV. Relevant religious institutions

5.14. In many countries, religious institutions are the key community organisations within their area. If the client is comfortable with a religious institution, practitioners should consider finding and vetting such potential partners. A critical advantage of these partners is that clients from their religion may be much more likely to trust and engage with these actors on the basis of shared religion, even when they do not personally know the particular church, mosque, or temple.

5.15. Several considerations exist in pursuing religious organisations as partners, however. First and most importantly, the major religions are by no means monolithic. Cultural, ethnic and sectarian divisions amongst many of the major religions will require the lawyer to determine the particular sect of the religion to which the client belongs. When in doubt, consulting with local service providers or other experts is strongly recommended. These experts may recommend against attempting to engage religious institutions in the client's home community, especially given considerations of whether such institutions are structured to provide the sort of liaison services needed.

5.16. Second, where such organisations in the client's home community appears to be the best opportunity for finding an appropriate partner, the lawyer may be able to inquire with Singapore-based religious organisations that serve the same ethnic and sectarian community as the client's. Again, care must be taken to ensure that the lawyer approaches the appropriate organisation. An Indian Muslim organisation is unlikely to have many useful connections to Muslim organisations in Central Java in Indonesia, for example.

5.17. Finally, even after such introductions are made, care must still be taken to ensure that these local partners fully support migrant workers and do not have conflicts of interest via ties to employment agencies or brokers in the area. Again on a practical level, not all such partners will have caseworkers on staff, so assessing capacity is also crucial.

A. International organisations

5.18. International governmental and non-governmental organisations with local offices in the client's home country often have the most extensive networks of local partners. Introductions from these organisations can save time in the vetting process, as such local entities are likely to be known and more trustworthy. Practitioners are still encouraged to vet the organisation for sufficient capacity, however.

i. International governmental organisations

5.19. Three governmental organisations are most involved in migrant worker issues and are likely to have access to potential local partners: the International Labour Organisation, (ILO) the International Organisation for Migration (IOM), and various branches of the United Nations. (UN) Note that these organisations' presences in each country are likely to vary significantly, and the size of their local office and particular mission focus for that country will have a large impact

on the level of help they may be able to provide in finding a local partner. While practitioners should not expect direct partnerships with these organisations, it is certainly worth inquiring whether they have caseworkers to assist, particularly where clients locate themselves near these entities' offices. All three organisations have mission goals that include supporting greater access to justice for migrant workers. The client's goals of just compensation will thus align with their mission and these organisations thus may be willing to provide help in finding local partners where possible.

1) The ILO

5.20. The ILO is perhaps the most directly involved in labour migration issues in the region. Access to justice is often a high mission priority, and the organisation has partnered with governments and local labour unions to establish local migrant worker centres. Practitioners should examine the programs that the ILO has set up in the client's country to determine whether such programs exist near the client's current location. Where they do not, a phone consultation with ILO staff may help in identifying a reliable partner closer to the client.

2) The IOM

5.21. The IOM frequently assists victims of human trafficking and exploitation in ensuring safe migration home and reintegration into their home communities. Those who use official IOM channels are most likely to obtain direct assistance from the IOM. These offices may have staff or volunteers who are equipped to partner with practitioners. However, lawyers should be prepared to ask IOM staff for referrals to local partner organisations instead, as their capacity may be limited.

3) The UN – UNDP and UN Women

5.22. The most relevant UN agencies are the UN Development Program (UNDP) and, where the client is female, UN Women. As of printing, the former has a stated interest in access to justice for migrant workers, particularly (although not exclusively) for women, while the latter works to advance women's rights, including for migrant workers. Note that each agency has separate and varying sizes of presence in home countries, with differing priorities by country. As these organisations often contract with local universities and NGOs to implement their missions, UNDP and UN Women are both good first points of contact for referrals to reliable agencies.

ii. International law firms with presences in both Singapore and the home country

5.23. International law firms may be willing to assist pro bono, should they have an office in the client's home country. For law firms, the opportunity to assist the client can help the firm either fulfil pro bono obligations to which it has committed, or else to create a positive story of community engagement in the client's home country. Note that many international firms will not have a firm-wide pro bono program; they will instead set their pro bono activities at a national level, particularly in countries that require the firm to partner with a local entity. Thus, firms that support migrant worker cases in Singapore may not necessarily do so abroad.

5.24. As always, proper vetting of the firm is important, particularly where home country offices are essentially once-separate local law firms that have formed a partnership with an international firm. Local labour brokers that supply employers in Singapore hire their own lawyers, and it is critical to confirm that law firms engaged in the home country are free of such conflicts of interest.

5.25. Should the firm prove appropriate, however, a law firm is one of the stronger partners that a practitioner can find. Local knowhow, experience with cross-border litigation, and sufficient capacity, including the potential for assisting in remote appearances via the firms' own telecommunications equipment, are a few of the unique advantages that cooperating law firms can provide.

iii. Singapore embassy in the client's home country

5.26. Singaporean embassies may keep lists of local law firms and lawyers whom they recommend to citizens who encounter legal issues while abroad. However, these entities are less likely to provide pro bono assistance.

6. ESTABLISHING A PARTNERSHIP WITH A LIAISON ORGANISATION

6.1. Potential partner organisations usually have relatively limited capacity. Providing a clear understanding of the potential commitment will make it more likely for them to either make a commitment or else assist in finding a local partner who has sufficient capacity to assist. The following describes the vetting process, followed by the most common activities that partner organisations will need to carry out.

I. Vetting potential partners

6.2. Prior to establishing a relationship, practitioners should vet potential partners to ensure that they are not only trustworthy, but have the capacity to meet the client's and the practitioner's needs. The following points apply to both organisations and individual pro bono attorneys who may partner with the practitioner:

A. What is the partner's reputation?

6.3. Some basic background research may be sufficient to determine whether the potential partner is trustworthy. This is a key consideration in some home countries, where an organisation's NGO status may simply be used to avoid tax liability for commercial activity. At worst, such organisations may actually have connections to unscrupulous employment agents or even human traffickers. Where information on the potential partner does not exist, practitioners should contact trustworthy entities in the client's country to confirm that the potential partner is reliable. The International Labour Office (ILO), the International Organisation for Migration (IOM) or the UN, particularly the UN Development Program (UNDP) or UN Women, are appropriate places to start, as their staff is often knowledgeable about local organisations.

B. Does the partner organisation have sufficient language ability?

6.4. In addition to speaking a language the lawyer understands, practitioners should confirm that the organisation has staff who speak the client's own language or dialect. This is particularly important where the client's first language is not the national language in their home country.

C. Is there sufficient capacity to assist the lawyer?

6.5. Organisations and pro bono attorneys are often already at capacity. While they may be willing to help, an honest assessment of whether they have the time and resources to assist is essential, particularly where case deadlines are involved. Practitioners should carefully map out the time commitment, the potential time span of the case, and the logistical issues that partner organisations will have to address so that both sides have a clear understanding of the people, time and monetary resources required for the case. Where potential partners do not have such capacity, these entities can still be helpful in recommending other appropriate partners.

II. Creating a formal agreement with a partner

6.6. Direct service and other aid organisations are usually bound by duties of client confidentiality that are similar to those of Singaporean lawyers. Practitioners will thus need to draw up a memorandum of understanding that authorizes cooperation, sharing of confidential client information, and procedures for transferring any monies collected in Singapore. The client should authorize this agreement after being fully informed of the nature of the agreement. The agreement should be in languages that the parties each understand, although this may be difficult, given resource constraints.

III. Maintaining contact with the client

6.7. Partners' most important task is making sure that clients can remain in contact with their lawyers in Singapore. While a partner cannot keep a client locked into a case should she decide that she no longer wishes to pursue the matter, the relationship with the client is critical to ensuring that the client continues to trust and is engaged in the process.

6.8. Maintaining contact often requires only periodic phone conversations, or where possible, in-person visits between the local partner and client. Partners who are based in the client's home community can more easily accomplish this, while clients who reside in more remote areas may need to rely upon organisations that are based in larger cities. Setting a regular check-in schedule, even when updates do not exist, is important not only in keeping the client connected, but also in building a relationship between the client and the partner.

6.9. Finally, migrant worker clients can be mobile. Both practitioners and partner organisations should be prepared for clients to move locations multiple times throughout the course of the case, including to other countries. These clients may be incredibly difficult to keep connected. For those clients who move within their own country, practitioners and partners should be prepared to find organisations in the client's new location who can serve as the new liaison.

IV. Collecting evidence and taking depositions

6.10. Although much of the evidence for legal claims highlighted in this manual will reside in Singapore, clients may have taken home personal bankbooks, logs of payments, or other information vital to the case. Where evidence of dealings with brokers or employers that took place prior to the client's departure are necessary to the case, partner organisations may need to collect such information, either from the client, the employment agency, or local government offices. Practitioners should determine what information is necessary and ensure that partner organisations have a clear understanding of what is needed, how to collect the information, and any deadline(s) that must be obeyed.

A. Explaining critical differences in evidence collection methods

6.11. Legal systems often have different requirements for how evidence is recorded and presented. Differences can range from required level of detail to proof of authenticity requirements, to even document formatting. Practitioners must provide partners with clear instructions, and where possible, pre-formatted forms that can help ensure that the evidence collected is admissible in Singaporean court. Failure to do so will result in wasted time and effort, as well as frustration for all involved. That said, practitioners should be prepared for delays and mistakes in evidence collection with new partners. Partner organisations may not be fully aware of the level of detail needed for Singaporean forms, and may rely upon methods that are valid in their own country in carrying out their tasks.

B. Arranging remote appearance in Singaporean court

6.12. Clients pursuing legal claims may be required to make an appearance in court. In some cases, they can do so remotely, via video conferencing.[5]

6.13. As of this printing, the minimum requirements for acceptable teleconferencing equipment or location is as yet unknown for migrant worker cases. It may be possible that a Skype meeting via a strong internet connection may be acceptable. However, as the courts look to whether a location is acceptably "secure," [6] the court may impose additional restrictions on the form of telecommunications used.

6.14. Lawyers and their partners should therefore be prepared to locate facilities that meet the court's requirements. The authors expect the following locations are more likely to prove acceptable:

- Universities with professional telecommunications equipment.
- United Nations facilities
- Government-run facilities
- Embassy facilities
- International law firms
- Television studios

6.15. Note that these facilities may require a fee to use. Practitioners and their partners will need to negotiate with facility owners for reduced or free use. For clients in Indonesia, the Philippines, or Thailand, please contact Justice Without Borders for assistance in locating such facilities.

[5] See Chapter 3, Section 4.III.B. for information on the legal requirements of remote appearances.

[6] *Ibid*.

7. HOME COUNTRY PRACTITIONERS SEEKING LEGAL AID IN SINGAPORE

7.1. For entities in the client's home country who believe that their client may have a viable claim in Singapore, connecting with a Singaporean NGO, religious entity, or their own country's embassy in Singapore can be an effective way to find legal aid. This section first provides basic questions useful in assessing the viability of a client's claims before introducing the various options for seeking legal assistance.

7.2. To determine whether your client may have a viable legal claim in Singapore, please first consult Chapter 2 for potential remedies. Should you believe your client has a claim and you reside in Indonesia, the Philippines, or Thailand, please contact Justice Without Borders for a free consultation.

I. Singapore's legal aid scheme

7.3. Currently, the Singaporean legal aid scheme does not offer legal aid to those who have already departed the jurisdiction. The Law Society of Singapore operates a pro bono office that may be able to help in exceptional circumstances via its Ad Hoc Pro Bono Referral Scheme, limited to finding a lawyer interested in assisting the case pro bono.[7]

II. Relevant NGOs

7.4. Singaporean NGOs are more familiar with the law and may be able to help make a further determination whether a viable case exists. However, no relevant NGO in Singapore employs their own legal staff. That said, these organisations may be able to help identify a pro bono lawyer willing to take on the case:

- **H.O.M.E.** [Indonesia, Philippines, China and others] **–** This organisation works with both domestic workers and labourers in other sectors. It is one of the largest direct service providers in Singapore.
- **Transit Workers Count Too (TWC2)** [Bangladesh, India, Indonesia, Philippines, and others] – Focusing on advocacy and some direct service, this organisation is most experienced in assisting clients with claims via the Ministry of Manpower (MOM) dispute resolution system.
- **HealthServe** [China] – This organisation works primarily with clients in the construction trades. It has paralegal staff to assist those with legal needs.

[7] See Law Society of Singapore Pro Bono Services Office, http://probono.lawsociety.org.sg or contact the office at +65 6534-1564, probonoservices@lawsoc.org.sg.

III. Religious organisations

7.5. Singapore is a multi-ethnic country that includes representatives of most major religions, including Hinduism, Islam, Christianity, and others. Readers should consult related organisations in their own country on whether the institution may have connections with affiliated organisations in Singapore.

IV. Embassies in Singapore

7.6. Almost all countries in the region have an embassy in Singapore. Some of these will have a labour attaché on staff, who is tasked with helping migrant workers from their country resolve legal and other issues encountered while in Singapore. **Please note that the capacity to help workers will vary by embassy, and that embassy staff are not empowered to provide legal assistance in Singapore.** However, embassies usually maintain a list of local lawyers who may be able to assist clients. These lawyers generally do not work pro bono. However, they may do so under exceptional circumstances or else provide referrals to a pro bono attorney. Note that, as is the case with other countries, pro bono attorneys in Singapore are often working at capacity and will likely prioritize those currently residing in Singapore.

8. ASSESSING CLIENT'S CLAIMS

8.1. Caseworkers in clients' home countries should consider the following questions in assessing a client's potential claim. Most important are amounts of money to be claimed, the amount of evidence available, and the commitment of clients to remaining in contact with their lawyer and pursuing the case.

I. How much can the client claim?

8.2. Also known as the "amount in controversy," clients must be able to reasonably claim a sufficiently large amount of money to overcome the costs of remote representation. Even where a Singaporean lawyer works for free, clients must often pay court costs. These costs can be recovered should the client win, but the up-front costs can be expensive. Clients with proof of a Singaporean court judgment or a settlement, are good candidates for pro bono aid, as the Singaporean lawyer need only attempt to enforce the judgment. For all others, a claim of at least S$10,000 is likely needed to justify the time and costs involved.

II. Calculating costs

8.3. Those with unpaid wage, contract fraud, or illegal payment claims should calculate what they believe is owed, based on either written or oral evidence. Service providers should check these amounts against the evidence that the client has provided. Where the client claims that the employer orally promised a certain wage or other terms, evidence of payment or at least of hours worked will be essential to substantiating the claim.

8.4. For those injured in on the job accidents, please consult Chapter 2 for potential compensation under the Singapore workers compensation scheme (WICA) and requirements for making a claim.[8] Those who are unable to claim under this scheme may still seek damages via civil litigation. However, costs can vary widely. Service providers should use the amounts set out in WICA as a baseline. Medical bills that can substantiate harm caused are particularly helpful. Where unsure, consultation with one of the Singaporean entities described above is recommended.

8.5. Those who claim other damages, including assault, battery, or sexual assault, should also contact one of the Singaporean entities below for additional assistance.

III. Assessing available evidence and procedural barriers to claims

8.6. Please see Chapters 2 and 3 for information on the evidence required for each claim. Evidence may be official documents, records that the client personally kept, phone or email records, or testimony from the client, coworkers, and/or other

[8] See Chapter 2 Section 5.III.

witnesses. Claims based entirely on oral evidence are likely very difficult to bring if the client is absent from Singapore.

8.7. Time limitations are often the biggest barriers that returnees will face in bringing claims. Please note the time barriers in Chapter 3. Additionally, incidents that happened further in the past are more difficult to substantiate. Records are more likely to have been lost or destroyed, witnesses may have moved or disappeared, and clients' own memories may be faulty. Generally, the more recent the client's experience, the more easily the case can be brought.

IV. Paying security for court costs

8.8. Defendants in Singaporean civil claims and ask the court to order out-of-country plaintiffs to pay a security deposit for the defendant's court and legal fees. These can run over S$10,000. It is theoretically possible to plead indigence and convince the court to waive the security deposit, it is unclear at the time of publication (October 2014) the standard or rule that the courts apply in evaluating a request for a waiver.

V. Assessing the client's interest in bringing the claim

8.9. Clients are often unaware of the time and effort involved in bringing a case, particularly remotely. Practitioners should fully inform the client that regular communication will be essential, and that claims can take six months to two to three years before the case concludes. However, by breaking the process down into smaller, more manageable steps, practitioners can provide a sense of progress even though it is tempered with the possibility that the client may not be able to recover in the end.

8.10. Finally, in terms of potential outcomes should be aware of all possibilities, from obtaining a settlement relatively rapidly to cases going through both trial and appeal. At the same time, practitioners should inform the client that they do not need to immediately make such a long term commitment to the case. Should an initial assessment suggest the client has a viable claim, practitioners should start by offering to investigate on the client's behalf. **The act of simply following up on a potential claim can be very helpful for clients, giving them a sense that others are working on their behalf. This can contribute to their recovery from exploitation, whether or not they are ultimately able to recover in the end.** In some circumstances, initial negotiations with the employer may lead to a settlement to the client's satisfaction. As unscrupulous employers usually rely upon the client's departure to end any legal complaint, the presence of a lawyer representing an overseas client may convince the employer to settle in order to avoid further legal headaches.

VI. Conclusion

8.11. A reliable partner in the client's home community can make the difference between a successful case and another case that ends in disappointment. While the legal and procedural hurdles are very real, the non-legal issue of client contact is the most critical to address in making cross-border litigation a reality for migrant workers. Finding a reliable partner who has the time and capacity to support the litigation can be difficult, but the avenues introduced in this chapter should provide a starting point in finding a suitable counterpart. Justice Without Borders can also serve as a helpful resource in its target countries, including Thailand, The Philippines and Indonesia. Service providers in those countries with clients returning from Singapore can also contact the organisation for a free consultation. As the field of cross-border pro bono litigation develops, JWB will update this manual, providing additional know-how in finding and working with partners abroad.


"Because the right to just compensation shouldn't end even when a victim returns home."
JUSTICE WITHOUT BORDERS

His Own Private Berkeley

For 13 Years, Lakireddy Bali Reddy's Demented Version of India's Caste System Thrived In One of California's Most Progressive Communities. But Truth Doesn't Always Survive a Collision of Culture and Law.

November 25, 2001 | ANITA CHABRIA | Anita Chabria is a freelance writer living in Los Angeles

A dozen customers pick over the idlies, dosas and curries that fill a stainless steel buffet in Pasand Madras Cuisine, an Indian restaurant in downtown Berkeley. Twelve people may not seem like much of a midday rush, but on this recent Saturday, Pasand is lucky to have them.

Last year at this time, picketers protesting sexual slavery and the death of a teenage girl who worked in the restaurant kept most patrons at bay, leaving the eatery and attached bar empty except for the handful of Indian immigrants who serve as waiters and cooks. Not even the owner--64-year-old Lakireddy Bali Reddy--was around. After federal prosecutors charged him with importing and employing illegal immigrants, and using the young girls among them as his concubines, he was released on $10-million bail in January 2000 and confined to his brother's house in Merced.

A federal indictment charged that during a 13-year period, Reddy--L.B. to his friends--and members of his family used fraudulent visas, sham marriages and fake identities to bring at least 33 men, women and children into the United States. In Berkeley, this most progressive of California communities, Reddy ruled over his victims like a feudal lord, imposing his law rather than U.S. law by keeping his targets isolated and afraid--of him, and of their tenuous position as illegal immigrants--and by importing the rules of the caste system, an apartheid that India has fought to eradicate but that still governs the daily lives of many Hindus.

In the rural southern Indian village of Velvadam, where Reddy was born, villagers consider him the king because of his power and generosity. Reddy used his status to convince poor villagers, mostly from the lowest rung of India's social system, that he could better their lives by bringing them to America. Once here, he used them to build a shadowy world where he reigned as lord of his own private Berkeley.

Reddy's victims worked as menial labor in his businesses for little or no pay, helping to make Reddy one of Berkeley's wealthiest landlords and entrepreneurs. They lived in Reddy-owned apartment buildings. (He owns more than 1,000 units in Berkeley, which bring in more than $1 million in monthly rents.) And they owed Reddy money that would take years to pay off. Prosecutors say that many of the young girls were required to have sex with Reddy, sometimes in groups.

But despite two years of investigation, a trial and an eight-year jail sentence, Reddy's case is still not closed. There is even a chance his plea bargain could be overturned. New facts--such as an interpreter who apparently encouraged witnesses to lie--continue to emerge, while old facts dissolve into fiction. Reddy's transgressions and the flawed investigation of those offenses are so culturally complex that, in the end, U.S. law may be unable to punish him fairly. He committed his crimes in an ethnic community where culture and law can often collide, leaving truth in pieces.

lakireddy bali reddy might have ruled his california kingdom

forever if it hadn't been for the accidental death of one of his concubines, 13-year-old Sitha Vemireddy, on Nov. 24, 1999.

Longtime Berkeley resident Marcia Poole was driving along a side street in downtown that day when she noticed four Indian men carrying what she at first thought was a green rug out the side door of a shabby apartment building. Their anxious and hurried manner struck Poole as "suspicious," she remembers. They headed toward a Reddy Realty van parked at the curb. At least a half dozen other Indians nervously watched their progress from the sidewalk. In the crowd was a young Indian girl dressed in traditional baggy pants and long overshirt called a salwar kameez. With her long hair in a single braid, she looked to Poole to be in her early teens. She was crying and pleading with the people around her. When Poole got closer, she noticed a "dip in the center" of the bundle the men were carrying, as if there was something heavy in it.

"Then I saw this leg descend from it," says Poole. "I realized they were carrying a body, and then they just threw it in the van."

The men then turned their attention to the pleading girl and pulled her toward the vehicle's open doors. But she was "resisting with all her might," says Poole, who jumped out of her car and planted herself between the struggling girl and the van. Inside, she saw that the body was moving and realized that it was another young girl. She was semiconscious and confused. Poole ordered the men to stop.

A man with a round face and balding head answered. Poole later identified him as Reddy. He told her to leave, that "this is none of [your] business," but she ran to another car and begged the reluctant driver to call 911.

As sirens approached, the men let the pleading girl go and acted as if nothing was amiss. The crowd melted away. "Then I knew something was really wrong," says Poole.

When police arrived, they found Sitha Vemireddy's body at the bottom of the stairwell from which the men had exited. She was a slim girl with wavy black hair gathered in an 18-inch braid, and she wore cheap yellow earrings and bracelets on each wrist. Her sister Lalitha, who had been hidden in the folds of her own loose clothing, was alive but disoriented in the van. Lalitha was taken to a nearby hospital.

On a podium in pasand's main dining room is a statue of the hindu god Nataraj--Lord of the Dance--who ceaselessly creates and destroys the fiber of the universe through his movement. The constant flux of Nataraj's world seems to have infected the investigation of Lakireddy Bali Reddy from the beginning, leading authorities through a maze of false starts and dead-ends that required them to travel thousands of miles and thousands of years into India's past before

unraveling the secrets behind Reddy's empire. The first problem investigators faced was language. Most of the witnesses spoke only Telugu, an Indian language of south-central India. Interpreters were hard to find even among Berkeley's large Indian population. So despite Reddy's involvement, investigators used him as an interpreter.

It was a bad decision.

"We needed someone to translate and he offered his services because we had an emergency situation out there on the street," says Lt. Cynthia Harris, chief of detectives and public information officer for the Berkeley Police Department. "Of course, in hindsight, we should not have done that."

Reddy told police that 18-year-old Laxmi Patati (the hysterical girl) shared a one-bedroom Reddy-owned apartment with Sitha and Lalitha Vemireddy. Patati came home that afternoon to find both girls unconscious. Because she spoke little English, she called Reddy's restaurant, where the three girls worked. Reddy came immediately with Venkateswara Vemireddy, one of the men carrying Lalitha to the van. Vemireddy claimed to be Sitha and Lalitha's father, and Reddy maintained that they were rushing the girls to the hospital when Poole stopped him.

Police accepted that story and the coroner ruled Sitha's death an accidental carbon monoxide poisoning caused by a blocked heating vent. Gas company inspectors found that the exhaust vent of the gas heater in the girls' apartment was not functioning properly, probably due to debris dropped by roofers several months earlier.

Reddy had Sitha's body cremated, a Hindu tradition, even though the girl's parents are Christian. Lalitha was released from the hospital, and the case was closed. Indeed, there seemed no reason to doubt Reddy--a man who appeared to be nothing but helpful, and who embodied the American Dream.

Reddy was born in 1937 in Velvadam, about an eight-hour drive from the nearest major city of Hyderabad in south-central India. He left India in 1960 to study engineering at UC Berkeley. Not satisfied with science, he turned to real estate and business. He opened an Indian restaurant in 1975, and eventually helped a sister start a successful spinoff. In the early '80s, he began buying shabby apartment buildings one after the other and made them livable, and partnered with a brother to create a construction company. Over the years, he earned a reputation as a savvy and generous entrepreneur. By 2000, his properties were valued at more than $69 million.

Velvadam, an agrarian hamlet of 8,000, is known as a "mini-U.S.A." because of Reddy's altruism, villagers claim. Reddy (who currently is divorced but has been married three times) built two elementary schools and a high school, created sources of clean drinking water and paid for a new wing at the local hospital. He spent more than $1 million to build the Lakireddy Bali Reddy College of Engineering, where more than 400 students study on state-of-the-art computers. He visits twice a year, and hosts an annual festival honoring his son Raj, who died in a motorcycle accident more than a decade ago.

The more money Reddy made in the States, the more good he seemed to do in his hometown. By 1986, he even began providing a back door into America for some of the village's poorest residents. He convinced them that coming to the U.S. represented a lifeline out of an ancient social system that promised only years of poverty and backbreaking labor. Although they shared a village with Reddy, their world was unlike his because of a single Hindi word: dalit.

Dalit literally means "broken people," but is often translated as "untouchable." It describes the 160 million people--one-sixth of India's population--affected by the country's hidden apartheid. It is neither a racial nor ethnic designation. The label is rooted in religion and based on birth, and it's passed from generation to generation. No one can determine when in history their family inherited the damning title. Dalits are treated as subhuman, so low that they are not even considered part of Hinduism's caste system. They're only allowed work that Hindus don't want, such as cleaning sewers and toilets, removing carcasses or digging graves. The Vemireddy sisters, Patati and most of Reddy's other alleged victims are all dalits.

India's Constitution of 1950 outlawed untouchability and created an affirmative action program called "reservations" that holds places for dalits in schools and government. But as black America knows, laws are easier to change than attitudes. In rural areas such as Velvadam, dalits often scrape by as coolies, or manual laborers. Sitha and Lalitha's father, Jarmani, was a coolie. The family lived in a segregated part of the village in a mud-walled hut with no electricity or running water. Jarmani could not afford the dowry required to allow his daughters to marry.

So when the king of Velvadam singled out destitute young girls such as the Vemireddy sisters to receive his aid, no one questioned his intentions.

"You go to India, to that village, and talk to anyone. They treat him like God," says Vijaya Lakireddy, a Reddy sister-in-law who lives in Merced. Even American investigators admit that many of the alleged victims view Reddy as a savior rather than a trafficker in human lives.

In December 1999, Berkeley police received an anonymous letter

that suggested Reddy had lied about Sitha's identity. Police teamed with the Immigration and Naturalization Service for a new round of interviews with 15-year-old Lalitha, Patati (the sisters' roommate) and the couple who claimed to be the sisters' parents--Venkateswara and Padma Vemireddy. This time, the investigators brought along independent interpreters.

After being questioned, Venkateswara Vemireddy broke and admitted he was not the girls' father. He and Padma had known Reddy in India. Padma was not his "wife," he said, but his sister. He claimed he had made a deal with Reddy in India. Reddy helped the Vemireddys obtain fraudulent visas by having Venkateswara pose as a computer programmer working for a Reddy company, and loaned him $6,500 for travel expenses. In exchange, the Vemireddys brought Sitha and Lalitha as their daughters.

Patati also had a new story, thanks to a different interpreter. She said that her father had sold her to Reddy when she was 12, making her one of India's estimated 15 million children kept as "bonded labor." Laxmi Patati was not her real name, and until coming to America, she had also worked as a servant on Reddy's estate in Velvadam and been in a sexual relationship with him there. According to documents filed by INS investigators, Patati "stated the primary purpose for her to enter the U.S. was to continue to have sex with Reddy."

Patati also said she was at the San Francisco airport when Padma Vemireddy arrived with Sitha and Lalitha posing as her daughters. (Venkateswara Vemireddy had traveled ahead of his fictional family.) Reddy and Patati picked up the girls and took them to the Bancroft Way apartment where Patati lived.

Padma went with her brother to a nearby apartment. Reddy had sex with both Sitha and Lalitha that day, according to Patati, who told investigators she was in the apartment at the time.

For the next three months, according to court records, the girls worked in Pasand's white-tiled kitchen, cleaned Reddy's apartment buildings and serviced his sexual desires.

On Jan. 18, 2000, police arrested Reddy. Shortly after, his sons Prasad and Vijay, Reddy's younger brother, Jayaprakash, and his brother's wife, Annapurna, were also charged with related crimes. The original nine-count indictment charged Reddy with conspiracy to commit immigration fraud, transportation of minors for illegal sexual activity and false statements on a tax return. Reddy was jailed, but quickly released on bail.

Interviewed from the house of his brother Hanimireddy Lakireddy, a Yale-trained cardiologist, an upbeat Reddy claimed, "I am the unfortunate guy. . . . I've got all these troubles."

But his troubles were just starting. Lalitha and Patati were detained in an INS facility while investigators continued to untangle the story. With the help of the American Civil Liberties Union and private lawyers, they were released from custody, and through the government-hired interpreters who were now becoming familiar to them, began to tell of unwanted sex, beatings, emotional abuse, working for almost no pay.

Investigators also were sent to India, where they found other girls who told similar tales. Seven women, counting Sitha, Lalitha and Patati, became part of the government's case. The girls, along with their families, were brought to the U.S. as material witnesses and promised help with legal immigration in exchange for their testimony, which seemed to grow worse by the day.

Despite speaking with authorities, the girls did not want to testify in court, perhaps fearing that even in America their status as dalits gave Reddy the power--maybe the right--to do as he pleased. They told investigators they were afraid for their safety and that of their families in India, where victims of sex crimes are considered as much to blame as the perpetrator. Court records say that Patati still suffers from a "relentless fear of retribution."

"Most people feel that being associated with this case is a mark or stigma," says Meera Trehan, a Bay Area attorney who says she plans to file a class action lawsuit on behalf of Reddy's victims. "There is a feeling that if you just did what you were supposed to do, maybe you wouldn't be involved."

Because the girls did not want to testify, the prosecution accepted a plea bargain. Last March 7, Reddy pleaded guilty to four felony counts: one count of conspiracy to commit immigration fraud, two counts of transporting a minor in foreign commerce for illegal sexual activity, and one count of subscribing to a false tax return. Two of the four co-defendants, Jayaprakash and Annapurna, also pleaded guilty to lesser charges, but both of Reddy's sons chose to go to trial.

Reddy faced a maximum sentence of 38 years, but received 97 months in prison--almost two years more than the prosecutors' recommendation. He also was ordered to pay $2 million in restitution, a sum divided between four victims: Sitha (paid to her family), Lalitha, Patati and Patati's cousin, whom Reddy had brought over years earlier. Crying in court, Reddy apologized to his brothers and children for bringing shame on them, but he never mentioned his victims.

The case seemed to be winding down over the summer. Reddy's younger brother and his brother's wife were due for sentencing hearings in July; Reddy's sons faced trial in the future. The principal victims were busy building new lives in America. Lalitha was even attending public school.

Then government prosecutors disclosed a problem to the Reddys' attorneys. One of the main independent interpreters--a woman named Uma Rao--had told the victims to "embellish" or "make bigger" their accusations against the Reddy family, according to court papers. Rao was one of the main interpreters used by both the prosecution and by civil attorneys working for the girls.

Four of the six living victims admitted Rao had told them to lie, and according to court documents, two said that they had. While Rao has not publicly given a reason for her actions, prosecutors have warned the Reddy family's defense attorneys that she asked the victims to "embellish" their cases by exaggerating the threats against them and the sexual charges against Reddy's sons. Some speculate that she may have felt she was helping the victims to articulate a situation that was beyond their understanding--in effect, shaping their stories for Western ears.

Many of the people working with the girls agree that they have had a difficult time putting the girls' experiences in an American context. Rao may have felt she was doing them a service by guiding them toward revelations that would have the greatest impact for prosecutors.

Another interpreter, Bharat Kona, also presented a problem. Kona, president of the Bay Area Telugu Assn., showed bias by raising funds for the victims and writing a letter to the court encouraging the judge to impose a harsh sentence. When Reddy finally went to jail, Kona posted a message on an Internet chat site proclaiming, "Finally, justice is served." The government dropped a rape charge against Vijay Reddy brought by a woman identified only as victim #7. The sentencing for Reddy's brother and sister-in-law was put on hold, and no trial date is scheduled for his sons Vijay and Prasad.

Although Reddy admitted to the sex charges and remains at Lompoc Federal Correctional Institution, the interpreters' bias throws into question much of the prosecution's evidence and the fairness of the proceedings. Reddy's plea agreement precludes appeals, but legal sources say Rao's and Kona's actions are serious enough that his case may be reexamined.

Still, a new trial presents the same old problems for the prosecution--Reddy's behavior is illegal, but his victims may never understand just how abhorrent sexual abuse of minors is in U.S. culture and may never make good witnesses. And perhaps the U.S. legal system may never be able punish Reddy for his worst transgressions in the eyes of some in the Indian community: stealing the promise of a better life in America from girls such as Sitha and Lalitha, and damaging the image of the Indian community at large.

Those, to many Indians, are his worst sins. But even if Reddy is given a new trial he remains a figure who committed his crimes in a kaleidoscope of mingling cultures, where truth can be a matter of perspective.

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INDEPENDENT NONPROFIT IN-DEPTH LOCAL NEWS

How an infamous Berkeley human trafficking case fueled reform

By Viji Sundaram (/members/viji-sundaram)

New America Media / SF Public Press — Feb 16 2012 - 11:43am

Advocates for increased prison terms say 10-year-old sex trafficking case changed conversation

This special report appeared in the Spring 2012 print edition** (http://sfpublicpress.org/news/spring-2012) **of the San Francisco Public Press. (Read in Spanish at La Opiñon/Impremedia. Leer en español en La Opiñon/Impremedia** (http://www.impre.com/noticias/nacionales/2012/2/20/buscan-leyes-mas-fuertes-antit-295457-1.html)**.)

More than a decade after she was freed from a sex trafficking ring in Berkeley, one survivor still has nightmares about Lakireddy Balireddy.

"Sometimes I wake up in the middle of the night after I dream that he is lying next to me, or see someone taking me to him," said the young woman, now in her late 20s, who agreed to an interview on the condition of anonymity. "I jump out of bed and turn on all the lights to make sure he's not in the room."

The media circus that resulted as the sex trafficking case broke in early 2000, with daily outraged headlines about Lakireddy's "sex slaves," started a statewide conversation that led directly to the passage in 2005 of Assembly Bill 22, California's first law setting higher criminal penalties for human trafficking.

This year's campaign to get tougher anti-trafficking laws on the November ballot as a voter initiative is the latest attempt to deal with what proponents call the unfinished business of legal reform.

Former Assemblywoman Sally Lieber, the chief sponsor of the 2005 state law, said the Lakireddy case "was confirmation of what the problem was," and "was definitely on our minds" when she and colleagues in the Legislature drafted the law. The final version established human trafficking for forced labor or services as a felony, punishable by a sentence of 3, 4 or 5 years (depending on severity of the case) in state prison for trafficking of an adult, and a sentence of 4, 6 or 8 years for trafficking of a minor.

The law also provides for monetary restitution and allows trafficking victims to bring civil actions against traffickers.

It might seem like a potent tool, but Lieber said tougher laws are needed.

The new initiative, a reform that proponents are calling the Californians Against Sexual Exploitation Act, would extend prison terms and allow fines of up to $1.5 million for human traffickers. It would also require training for law enforcement, something that could have helped police detect the sex trafficking ring much sooner, said San Francisco attorney Michael Rubin of the law firm Altshuler Berzon LLP, who represented some of Lakireddy's victims in a 2002 civil suit.

An accidental death

In 2001, federal law enforcement officials convicted the then 64-year-old restaurateur and real estate tycoon — one of Berkeley's richest landlords, who raked in at least $1 million a month from his 1,000 or more rental properties — of two counts of transportation of

Lakireddy Balireddy shocked the E investigators discovered how the B women and girls from India for se case still inspires reformers who w longer. File photo // India West

Lakireddy Balireddy was escorted relatives signed papers saying he w // San Francisco Examiner (Photo Library)

minors for illegal sexual activity. He was also convicted of conspiracy to commit immigration fraud and filing a false tax return.

A federal investigation also found that Lakireddy had been "carrying out a widespread conspiracy since 1986 to bring at least 25 Indian laborers into the United States through false pretences," according to a March 2001 Department of Justice statement. The immigrants were brought from his native village of Velvadam in southern India.

The sexual abuse of the girls began years earlier in the village and continued after he trafficked them into the United States, prosecutors said.

"He turned Berkeley into a Velvadam-by-the-Bay," Rubin said.

In addition to subjecting the trafficked girls to what federal prosecutors called "sexual servitude," Lakireddy allegedly forced many of them to work in his downtown Berkeley Indian restaurant, and do cleaning and maintenance work on his rental properties. He justified not putting them on payroll, or paying them very little, by saying he provided them free food and accommodation. Few of the girls were sent to school.

The abuse might have gone undetected even longer but for a carbon monoxide leak in November 1999 in one of his Berkeley apartments that killed Chanti Pratipatti, 17, whom he had trafficked months earlier. She and her 15-year-old sister had been brought to the country by two of Lakireddy's relatives who masqueraded as their parents, and were siblings themselves.

Lakireddy was arrested on Jan. 14, 2000, two days before his planned departure to his native land with one of his trafficked victims.

A March 7, 2001, Department of Justice press release said Lakireddy might face up to 38 years in prison under a plea deal he struck with prosecutors. But that April, before he could be sentenced, his attorneys managed to bargain it down to a 97-month term. Lakireddy also agreed to pay $2 million in restitution to the surviving sister, her parents and an 18-year-old girl who was living with the sisters at the time of the accident.

Lakireddy spent a little less than eight years in Lompoc federal prison. After his release in 2008, he registered as a California sex offender.

Asked why the real estate tycoon received so much lighter a punishment than originally threatened, the two main prosecutors declined to comment. The presiding judge did not return several phone calls seeking comment.

'Creative' ways to sue

Anti-trafficking activists said the legal reforms that later made prosecutions easier coincided with growing public awareness about the problem of human trafficking — transporting people for labor through force, fraud or coercion.

"Until 2000, nobody knew what human trafficking was, what the term meant," said Cupertino-based Kavitha Sreeharsha, executive director of Global Freedom Center, a recently launched nonprofit organization that fights trafficking worldwide.

Sreeharsha, who has been at the forefront of women's rights for nearly 20 years as a lawyer and activist, said the case of the notorious Berkeley landlord was a game changer. It "galvanized" victim assistance providers in the Bay Area and ultimately served as "the building block for the state's anti-trafficking movement."

But when Rubin filed the civil lawsuit against Lakireddy, he did not have the benefit of the state's anti-trafficking laws. Nor could he apply any of the provisions of the federal Trafficking Victims Protection Act, the nation's first anti-trafficking law enacted in 2000.

"When we filed the civil suit, federal law did not yet provide civil action for victims of sex and labor trafficking," Rubin said.

The federal act strengthened criminal sanctions for forced labor, mandated that victims receive social and legal support and gave victims the right to remain in the United States if they cooperated with law enforcement. But that was only for federal cases. California prosecutors would wait another five years for the state's own anti-trafficking law.

Rubin had to base his case on other laws. He said he thought the victims had not received justice in the criminal case, and that they should be compensated for the harm done to them.

"We had to pursue our lawsuit in a very creative way," Rubin said. "We had to develop new theories because there were no applicable anti-trafficking statutes back then."

The civil complaint, filed in Alameda County Superior Court in

Oakland, accused Lakireddy of "slave labor," "false imprisonment," and "infliction of emotional distress," among other claims. The allegations of the civil complaint also accused Lakireddy of having raped the women he trafficked.

The complaint also included claims brought under the federal Racketeer Influenced and Corrupt Organization, or RICO, statute. Filed on behalf of nine alleged victims of the Lakireddy clan, the lawsuit sought up to $100 million in damages.

In the complaint, Rubin accused the defendants of exploiting the victims' "youth, their fear, their caste status, their poverty, their unfamiliarity with the American legal system, their inability to speak English, and their immigration status" for the defendants' "personal pleasure" and "illicit profit."

The class-action lawsuit resulted in an $8.9 million settlement in June 2004.

Lakireddy Balireddy did not act alone to mistreat the women he brought to America. He had help from several members of his family, prosecutors discovered.

Five members of Lakireddy's family were also implicated by law enforcement in various aspects of his criminal activities. His sons, Vijay Kumar Lakireddy and Prasad Lakireddy, were indicted in 2001 on several counts of rape and conspiring with their father for more than a decade to smuggle women and girls into the U.S. to have sex with them, the San Francisco Chronicle reported. In an agreement with prosecutors, the most serious charges were dropped and Vijay Kumar Lakireddy pleaded guilty to immigration fraud conspiracy. He was sentenced to two years in prison and agreed to undergo drug treatment and pay $40,000 in fines. Lakireddy Balireddy's brother and sister-in-law were also convicted of related crimes.

Beyond the criminal case, Rubin's civil suit also brought in several other relatives as defendants.

Influence in Indian village

The Lakireddy trafficking saga revealed elements of feudalism and casteism that clashed with American cultural and social norms. Those factors made it complicated to address what prosecutors and lawyers in the U.S. saw as a broader trafficking operation.

In Velvadam, an agrarian village of about 8,000 in the southern Indian state of Andhra Pradesh, Lakireddy's immense wealth — his Berkeley properties alone are worth an estimated $60 million — and his long ties to America earned him both respect and fear.

Western journalists who descended on the village soon after his arrest were surprised by the extent of his power among locals. Minutes after reporters entered the village, banners went up on buildings. One read: "Lakireddy Is Our God. Leave Him Alone." Another declared: "Lakireddy Is Innocent."

Lakireddy used his inherited and earned wealth to launch several philanthropic ventures. Starting in the mid-1980s, he built two elementary schools and a high school in Velvadam. The state-of-the-art Lakireddy Balireddy College of Engineering, opened in 1998, lent a certain cachet to the neighboring township of Mylavaram. He also created new sources of clean drinking water. Bus shelters sport the Lakireddy name.

Many of the girls he was accused of exploiting belonged to the so-called untouchable communities, their parents barely making $1 a day from menial jobs. Most lived in one-room thatched-roof houses.

Prosecutors said during his criminal case in U.S. District Court in Oakland Lakireddy convinced villagers that an American lifestyle was within their grasp if they just gave him their young daughters. Many obliged, including the parents of the two sisters who had lived in the Berkeley apartment where the fatal gas leak occurred.

The girls' older sister had already been married off when the two younger sisters went to live with Lakireddy. "We couldn't have afforded the kind of dowry we paid for our older daughter," explained their mother, Lakshmi Pratipatti, in an interview in Velvadam in 2000. She said she and her husband felt that sending two of the daughters off to the United States with Lakireddy would save them a fortune.

The two sisters, like nearly all the other girls, had ostensibly been recruited to work as servants in his opulent three-story home in Velvadam that sat on a beautifully landscaped two-acre plot. Behind those walls, they also worked as his sex slaves, Rubin's civil lawsuit alleged, something that some trafficked victims said their parents must have known would happen.

Victims still uneasy

"I was given to him when I was nine," one trafficked woman said, adding: "The day I was given to him, my childhood ended and my misery began."

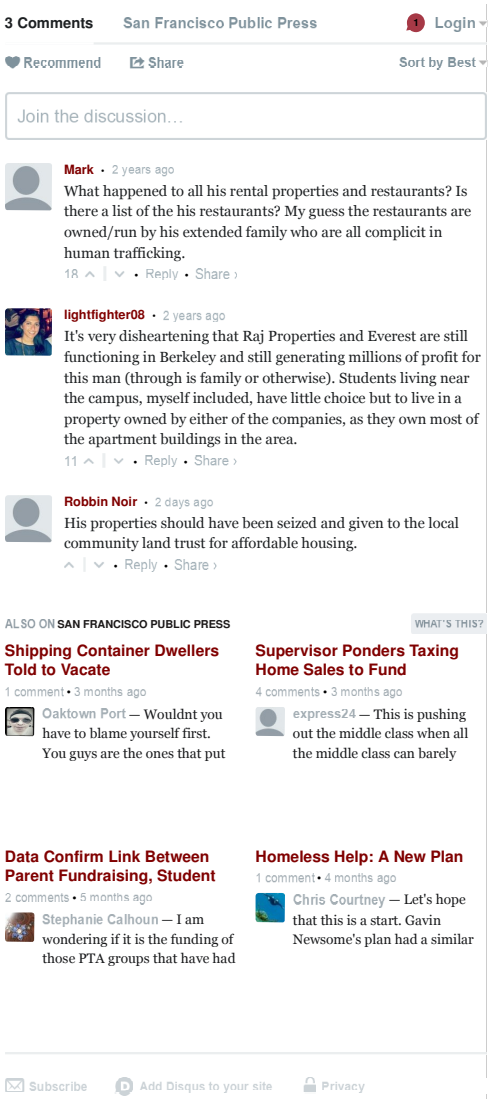
Lakireddy "was unimaginably wealthy, all-powerful and in apparent full control of the world in which they were brought to live," prosecuting Assistant U.S. Attorney John Kennedy said in court papers during the criminal proceedings.

The Lakireddy case may have led to California's first anti-trafficking law, but reform advocates say its longer-term aftermath is less heartening. Victims and lawyers say the Lakireddy case continues to haunt its victims.

Even as the momentum grows to combat trafficking in the state, the survivors have been unable to find peace of mind. More than a decade after she was rescued, one young woman still needs to take sleeping pills to help her cope with flashbacks.

Meanwhile, Lakireddy Balireddy, now 75, roams freely in his village, which he visits twice a year, and continues to enjoy the admiration of many of those around him, according to his brother, Lakireddy Hanimireddy, a cardiologist who lives in Merced.

"He has the 100 percent respect of the people of Velvadam," the brother said. "His overwhelming good deeds and not his bad deeds are what earn him so much respect."



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Mark · 2 years ago
What happened to all his rental properties and restaurants? Is there a list of the his restaurants? My guess the restaurants are owned/run by his extended family who are all complicit in human trafficking.
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lightfighter08 · 2 years ago
It's very disheartening that Raj Properties and Everest are still functioning in Berkeley and still generating millions of profit for this man (through is family or otherwise). Students living near the campus, myself included, have little choice but to live in a property owned by either of the companies, as they own most of the apartment buildings in the area.
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His properties should have been seized and given to the local community land trust for affordable housing.
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I visited UC Merced where I saw "Lakireddy" name on Hall. What a disgrace! Even if that name is that of his brother in Merced, it's disgusting especially after reading his comments in the above article about "good deeds" of his monster brother. Just because cow dung or manure has some good uses doesn't mean it's ok to plaster a wall with it.

Submitted by Anonymous (not verified) on Fri, 04/13/2012 - 15:22.

Missing from this well researched piece is the legal route used for trafficking: the H1-b corporate program, commonly known as "high-tech" visas. Because this program allows companies to recruit abroad -- first and only-- for their US job openings, it is essentially "human trafficking" ready!

Balireddy took 2 simple steps. He filed fake job openings with the Dept. of Labor and they gave him a permit for H1-b visas. The DOL has no authority to verify that his company had this job available and has no authority to require that he seek American talent first. Then he took the permits to the USCIS, along with fraudulent documents, and he received H1-b visas.

So there's an easy way to stop human trafficking: fix all corporate visa programs so employers must seek American talent first before recruiting abroad. Restoring our right to compete for job openings we are qualified to do also protects foreign citizens from being trafficked.

That's what Equal Opportunity can do.

Donna Conroy, Director
Bright Future Jobs

P.S. A bill in the Senate will be introduced soon to give the DOL oversight and give Americans the first crack at US job openings.

Submitted by **Donna Conroy** (http://brightfuturejobs.com) (not verified) on Tue, 03/20/2012 - 13:21.

The Lakireddy case is more complicated than it is cast here.

There were allegations that a key prosecution translator had been coaching witnesses to embellish their testimony, which impaired the credibility of the prosecution. See: http://www.berkeleydailyplanet.com/issue/2004-03-30/article/18557?headline=Lakireddy-Seeks-To-Rescind-Guilty-Plea-Son-Awaits-Sentence--By-MATTHEW-ARTZ
This, along with the strain of such a complex case, paved the way for an ultra-lenient plea bargain.

Moreover, during the financial settlement talks, a conflict of interest developed between the civil attorneys & the Prattipatis. Despite agreeing to the settlement, the Prattipatis later sued their prior attorneys (including Michael Rubin) alleging that they had committed malpractice. See: http://archive.dailycal.org/article/18884/sex_ring_plaintiffs_sue_former_attorneys and the complaint at: http://home.sandiego.edu/~dmcgowan/Professional/Prattipati1stAmendedComplaintFinal..pdf.

This article does not mention either of these issues. This prevents the reader from understanding that the Lakireddy case is equally significant for showcasing what kinds of mistakes to avoid in future cases.

Submitted by Anonymous (not verified) on Sat, 02/18/2012 - 20:48.