

Clearinghouse REVIEW

March–April 2012
Volume 45, Numbers 11–12

Journal of
Poverty Law
and Policy



Medicaid Coverage of Adult Diapers Obtained for Persons Living in the Community

FTC Help for Low-Income Consumers

Civil Protection Orders for Teens

Systemic Change for Marginalized Workers

Protections for Remittances

Consumer Rights Screen for Domestic Violence Lawyers



Sargent Shriver National Center on Poverty Law



Systemic Change for Marginalized Workers



By Jennifer J. Lee

Jennifer J. Lee
Managing Attorney

Migrant Farm Worker Division
Colorado Legal Services
1905 Sherman St. Suite 400
Denver, CO 80203
303.866.9366
jlee@colegalserv.org

Raul, a shepherd from Peru, came to the United States on an H-2A visa. He intended to work here for three years but ultimately walked away from his job because the working conditions were intolerable. Raul worked sixteen-hour days during the lambing season and was not allowed to take breaks, even for lunch. Raul lived in a one-room trailer, with a wood stove for heat, but he often did not have enough wood. Although Raul's food and housing were free, he was earning less than \$2 an hour. He never received a monthly accounting of his pay, and his boss kept his passport and visa. His boss also verbally abused him. The final straw was when Raul called his family and the boss grabbed the telephone after two minutes; he said that Raul had been talking for too long. Raul left the ranch in the middle of the night and walked for three hours until he found someone who could give him a ride to safety.¹

Raul arrived on the doorstep of the Migrant Farm Worker Division of Colorado Legal Services. A review of the applicable laws, however, revealed no ready solutions. The regulations governing the H-2A program for shepherders did not prohibit verbal abuse, nor did they provide for breaks or the right to communicate with the outside world.² As a shepherd, Raul was also exempt from many of the state and federal laws that protect workers; he did not have the right to receive the state or federal minimum wage, for instance. His own contract, approved by the U.S. Department of Labor, required him to be on call twenty-four hours a day, seven days a week, with a monthly wage of \$750 a month.

¹The client's name has been changed; complaint filed with the U.S. Department of Labor, June 10, 2009 (not a formal court case that either has a case name or is in the public record; in my files).

²Admission of Temporary H2-A workers, 8 U.S.C. § 1188 (2011); 20 C.F.R. §§ 655.100–655.185 (2011); Employment and Training Administration, U.S. Department of Labor, Training and Employment Guidance Letter (TEGL) No. 32-10: Special Procedures: Labor Certification Process for Employers Engaged in Shepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47256 (Aug. 4, 2011), <http://1.usa.gov/WLhRGt>; Employment and Training Administration, U.S. Department of Labor, Training and Employment Guidance Letter (TEGL), No. 15-06, Change 1, Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock Under the H-2A Program, 76 Fed. Reg. 47243 (Aug. 4, 2011), <http://1.usa.gov/xFPhYK>.

That Raul's conditions constituted a human rights violation became apparent as more workers with similar facts contacted Colorado Legal Services.³ Despite the possible risks they faced, these courageous workers were unwilling to accept mistreatment and insisted on making a difference for other herders. What sort of structural remedies could be used to achieve justice for these workers? Here I examine the strategies used by one legal services office to build a project that would create systemic change for this vulnerable and marginalized population. Colorado Legal Services thought creatively about everything from legal representation to collaborating with other community-based organizations when determining how to help these clients.⁴ In employing these tools to create the Shepherd Project, the organization tried to consider how it could think big and be determined, assertive, creative, and strategic, while taking the long view of systemic change.⁵

I. Background

In the western and mountain states a nearly invisible population of immigrant workers toils, herding sheep, goats, and cattle. These herders primarily graze livestock in open range lands but also spend time working on ranches. They handle everything from repairing fences to birthing livestock. They live in small, one-room trailers, called "campitos," which usually have no running water or

toilets. Herders are expected to be on call twenty-four hours a day, 365 days a year, and, in most cases, make less than the federal minimum wage.

Most herders enter the United States with H-2A visas, temporary visas available to agricultural workers. Each year about 1,600 workers come from various countries to the United States to herd sheep, goats, and cattle.⁶ Herders primarily come to Colorado, Wyoming, Montana, Arizona, Utah, Idaho, Nevada, California, Oregon, and Washington. In the mountain states most workers come from Peru; however, some are from Chile, Bolivia, Mexico, and Nepal.⁷

In the early 1950s, the United States had special legislation that enabled herders from foreign countries to gain entry to this country on an expedited basis. The legislation also permitted herders to gain lawful permanent residency, bring over family members, and ultimately become naturalized American citizens. At the behest of ranchers, Congress investigated and concluded that the industry would be better off if workers "were admitted temporarily for appropriate periods of time, and that at the conclusion of such periods they were required to return to their country of origin and to their families."⁸ Congress permitted the special legislation to expire and made the "importation" of foreign shepherders part of the temporary agricultural worker program, known today as the H-2A program.⁹

³International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 25, G.A. Res. 45/158, 45th Sess. (Dec. 18, 1990). The United States has neither signed nor ratified the convention (see United Nations Treaty Collection, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990), <http://bit.ly/xBr49k> (status of treaties)).

⁴Advocates attempting similar work must be prepared for all the attacks (such as being informed that "liberalism is a mental disorder") that come with such efforts (Don Dunbar, *Attack on Sheep Herders Unfair*, TRIB.COM (Jan. 20, 2010), <http://bit.ly/u1attW> (letter to editor)).

⁵Florence Wagman Roisman, *Thirteen Principles for Effective Advocacy*, 63 RUTGERS LAW JOURNAL 985, 997 (2011).

⁶This figure is a rough estimate based on the number of workers requested by ranch employers through the U.S. Department of Labor from June 2010 through May 2011. To view the relevant job postings, see Employment and Training Administration, U.S. Department of Labor, H-2A Public Job Registry (n.d.), <http://bit.ly/t3wIbz> (select "H-2A" in drop list for "Case Type," select "Active" in drop list for "Case Status" and "All" in drop list for "State or Territory of Intended Employment," select "Non-Crop-Shepherd" in the drop list for "Primary Crop," and insert "6/1/10" to "5/31/11" in "Job Order Posting Date Range").

⁷Jennifer J. Lee & Kyle Endres, Colorado Legal Services, *Overworked and Underpaid: H-2A Herders in Colorado* 10 (Jan. 14, 2010), <http://bit.ly/58BGEW>.

⁸H.R. REP. NO. 85-67, at 5 (1957).

⁹*Id.*

A. The H-2A Program

The H-2A program authorizes an agricultural employer to bring in temporary foreign workers from abroad if it is able to prove that no U.S. workers are available for the job.¹⁰ The Labor Department oversees a regulatory scheme to ensure that U.S. workers are given preference over H-2A workers for these positions and that the employment of H-2A workers does not adversely affect the compensation and working conditions of U.S. workers.¹¹ The goal of the scheme is to protect U.S. workers by preventing employers from lowering employment standards by hiring H-2A workers.¹²

The problems inherent in the H-2A program are well documented.¹³ Because the visa ties the worker's authorization to be in the United States to a single employer or association, workers not only lack bargaining rights in relation to their jobs but also fear complaining due to concerns about retaliation.¹⁴ Abuses in the recruitment system in their countries of origin create a situation in which workers arrive in debt, susceptible to debt bondage and forced labor.¹⁵ Since H-2A visas do not provide a route to lawful permanent residency in the United States, H-2A workers have become an underclass of temporary workers.

Although the federal regulatory scheme ostensibly protects workers, the reality is that it affords little or no protection to H-2A workers. The Labor Department does not generally provide affirmative oversight, for example, by regularly inspecting employer work sites. Nor does the Labor Department typically penalize employers who violate regulations, in the experience of Colorado Legal Services advocates, whether due to a lack of resources or the structural flaws in the regulatory system itself.¹⁶ H-2A workers do not otherwise have an apparent federal remedy because they are exempt from the Migrant and Seasonal Agricultural Worker Protection Act, the federal legislation providing a private right of action for farmworkers for claims related to false recruitment, housing, pay, and working conditions.¹⁷

H-2A herders are even worse off than their field worker counterparts in the H-2A program. Special procedures issued by the Labor Department exempt herders from many of the general H-2A regulatory protections.¹⁸ For example, housing does not need to meet the Occupational Safety and Health Administration Standards; this means that ranchers are not required to provide running water, electricity, toilets, or a requisite amount of square footage of living space for each herder.¹⁹

¹⁰8 U.S.C. § 1188. The H-2B program similarly authorizes employers to bring in foreign workers for temporary jobs, but in industries other than agriculture, such as the landscaping, seafood, and ski industries. For a discussion of the H-2B program's deficiencies and exploitation of workers, see Jayesh M. Rathod, *A Season of Change: Reforming the H-2B Guest Worker Program*, 45 CLEARINGHOUSE REVIEW 20 (May–June 2011).

¹¹See generally *Alfred L. Snapp and Son Incorporated v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594–96 (1982).

¹²20 C.F.R. §§ 655.100 et seq. (2011).

¹³See, e.g., Etan Newman, *Farmworker Justice, No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011), <http://bit.ly/zFLhDD>; Mary Bauer, Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007), <http://bit.ly/eSlOtO9>; Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 521 (2002).

¹⁴Michael Holly, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL 575, 596–97 (2001); Hall, *supra* note 13, at 529.

¹⁵John Bowe, *Bound for America*, MOTHER JONES, May–June 2010, <http://bit.ly/vjsNqV>.

¹⁶Hall, *supra* note 13, at 531; Bauer, *supra* note 13, at 28–29; Holly, *supra* note 14 at 604.

¹⁷Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872.

¹⁸Employment and Training Administration, Training and Employment Guidance Letter No. 32-10, *supra* note 2; Employment and Training Administration, Training and Employment Guidance Letter No. 15-06, *supra* note 2.

¹⁹29 C.F.R. § 1910.142 (2011). Older housing is subject to Employment and Training Administration, U.S. Department of Labor, standards (see 20 C.F.R. §§ 654.404–.412 (2011)).

The special procedures require that herders be on call for up to twenty-four hours a day, seven days a week. Instead of an hourly wage, the Office of Foreign Labor Certification determines a prevailing monthly wage. In 2011 the prevailing wage for a shepherd in Colorado was \$750 a month, which, on average, works out to \$2-to-\$3 an hour.²⁰ By contrast, their H-2A counterparts in the fields were required to be paid an hourly wage of \$10.48 an hour.²¹ Herders are allowed to receive far less than the federally mandated minimum wage because they are specifically exempt from the Fair Labor Standards Act.²²

B. The Reality that Herders Face

Herders face the traditional barriers—such as language barriers, lack of information about their legal rights, and fear of retaliation—in accessing legal services encountered by farmworkers.²³ Such barriers, however, are exacerbated by their extreme isolation. Herders are located out on the open range and can be many miles away from the closest town. Most herders lack any means of accessing basic services through anyone other than their employers. They are wholly dependent on their employers for their food and supplies, as well as for their communication with the outside world.

Surveys of herders reveal that employers often have complete control of basic aspects of herders' lives.²⁴ Employers sometimes hold workers' immigration documents for supposed safekeeping and control all financial transactions, including workers' wiring money to their families or withdrawing spending money from their bank accounts.²⁵ Many herders lack cell phones and have no way to communicate with the outside world except by requesting permission to use the employer's phone.²⁶ Herders generally have no opportunity to leave the ranch to visit friends, go shopping, or attend religious services.²⁷

This power imbalance is ripe for exploitation. Herders suffer the H-2A program's endemic abuses, which are often worsened by their isolation and dependence on their employers. In more extreme cases, herders lack access to medical care, suffer from malnutrition, endure both emotional and physical abuse.²⁸

II. Advocacy Tools

Once Colorado Legal Services committed to representing herders, the organization had to consider how to do so with limited resources, the workers' geographic isolation, and Legal Services Corporation (LSC) restrictions.²⁹ A threshold was how to lo-

²⁰Employment and Training Administration, U.S. Department of Labor, Foreign Labor Certification, Agricultural Online Wage Library (Jan. 26, 2012), <http://bit.ly/rKwQRi> (select "Colorado" in the drop list for "Crop and Livestock Survey Reports"). E.g., if a shepherd works ten hours a day, seven days a week, he is earning \$2.47 per hour plus free food and housing. Not only is ten hours per day an extremely low estimate, but also it excludes the "on-call" time that is compensable in other professions.

²¹Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2011 Adverse Effect Wage Rates, Allowable Charges for Agricultural Workers' Meals, and Maximum Travel Subsistence Reimbursement, 76 Fed. Reg. 11286 (March 1, 2011).

²²Fair Labor Standards Act, 29 U.S.C. § 213(a)(6)(E).

²³Susan Reed & Ilene J. Jacobs, *Serving Farmworkers*, 38 CLEARINGHOUSE REVIEW 367, 369 (Sept.–Oct. 2004).

²⁴Chris A. Schneider et al., Central California Legal Services, *Suffering in the Pastures of Plenty: Experiences of H-2A Shepherders in California's Central Valley* (2000); Lee & Endres, *supra* note 7.

²⁵Schneider et al., *supra* note 24, at 15; Lee & Endres, *supra* note 7, at 15, 19.

²⁶Central California Legal Services, *Watching Sheep and Waiting for Justice: An Update on the Experiences of H-2A Shepherders in California's Central Valley* 18 (2005); Lee & Endres, *supra* note 7, at 17.

²⁷Lee & Endres, *supra* note 7, at 15–16.

²⁸Newman, *supra* note 13, at 33; Felisa Cardona, *Peruvian Shepherders' Lawsuit Alleges Abuses by Craig Ranch*, DENVER POST, April 7, 2010, at 3B; Dan Wheat, *Sheep Rancher Sued for Labor Violations*, CAPITAL PRESS, Oct. 14, 2011, <http://bit.ly/tpK87F>; Brandon Johnson, *Chilean Workers File Lawsuit, Say Dickinson Family Exploited Them*, CRAIG DAILY PRESS, June 5, 2006, <http://bit.ly/ttW4g5>.

²⁹For ideas, see Camille D. Holmes et al., *Race-Based Advocacy: The Role and Responsibility of LSC-Funded Programs*, 36 CLEARINGHOUSE REVIEW 61 (May–June 2002).

cate workers who needed services, short of them walking off the job and somehow finding Colorado Legal Services' contact information. In order to provide meaningful legal representation, Colorado Legal Services also had to find ways to overcome the inadequate regulatory system purportedly for the herders' protection. And, as some of the abuses appeared to be endemic to the H-2A program, the underlying program itself needed adjustment to bring the conditions of the herders into the twenty-first century.

A. Public Education: Outreach and Media

Outreach to herders about their legal rights has been an essential element of Colorado Legal Services' public education strategy.³⁰ Utilizing the skills and dedication of an ex-shepherd proved essential in performing effective outreach because of the vast terrain where livestock graze. The organization's shepherd outreach specialist has knowledge of seasonal grazing patterns and federal range lands; this has proved essential to locating herders. As an ex-shepherd, the specialist is able to gain the trust of herders, who often are fearful to voice concerns about their working and living conditions.

Volunteers have also been essential in reaching out to herders. Various volunteers accompany the shepherd outreach specialist and witness and document the herders' conditions. Colorado Legal Services fostered relationships with Good Samaritans, such as local community members in nearby towns, to distribute educational materials and refer herders in need of legal assistance.

Colorado Legal Services also sought to reach workers in their home countries before they dispersed throughout Colo-

rado. For example, most Peruvian herders receive educational materials from the Ministry of Foreign Relations in Peru before they come to the United States. The organization is attempting to disseminate educational materials through networks of Catholic churches in countries that send H-2A herders.

Media are another integral element of Colorado Legal Services' outreach strategy. Issuing a white paper transforms anecdotal information into quantifiable and valuable data for drawing attention to the issue in the public sphere.³¹ The organization conducted a survey of every herder it came into contact with over a period of eighteen months. The survey asked questions about living and working conditions. In particular, it focused on conditions, such as the lack of access to telephones and days off from work, that conflict with fundamental human rights norms available in the workplace. Colorado Legal Services' report on the findings was readily downloadable in English and Spanish from the organization's website.³²

Using the news media built broader public awareness while giving a voice to herders. Colorado Legal Services developed media contacts, with the assistance of other community-based organizations, for information for potential news stories. Colorado Legal Services' report, as well as any litigation filed, triggered media examination of the herder issue. The plight of herders was revealed in far-ranging news media outlets, from local to national newspapers and radio, including Spanish-language media and television.³³

B. Participating in Collaborative Efforts

Colorado Legal Services found that collaborating with governmental agen-

³⁰Colorado Legal Services' outreach involves giving information to herders about their legal rights (*id.* at 72) ("LSC-funded programs must engage in outreach to educate low-income persons about their legal rights and responsibilities and the options and services available to solve their legal problems").

³¹The idea of surveying shepherders by Colorado Legal Services is the suggestion of Chris Schneider of Central California Legal Services.

³²Lee & Endres, *supra* note 7.

³³See, e.g., Dan Frosch, *In Loneliness, Immigrants Tend the Flock*, *NEW YORK TIMES*, Feb. 21, 2009, at A14, <http://nyti.ms/wPJnT>; Francisco Miraval, *Pastores Hispanos Viven en Condiciones Deplorables en Colorado, Según Informe*, *TERRA*, Jan. 14, 2010, <http://bit.ly/tT5jfl>.

cies, community-based organizations, and civil rights groups created meaningful change for herders. The organization participates in a joint task force with others that have a vested interest in the humane treatment of herders. One joint task force member, the Colorado Immigrant Rights Coalition, a statewide immigrant-advocacy organization, advocated legislation that sought to improve the living and working conditions of herders.³⁴ In 2010 a compromise bill creating a Range Worker Advisory Council was introduced in the Colorado Legislature.³⁵ During the legislative process, the bill's sponsor relied on Colorado Legal Services as the informational resource on how policies affected herders.³⁶ The ranching industry lobbied forcefully against any sort of legislation, and the bill failed to pass. The process, however, yielded valuable lessons for what will undoubtedly be future reform efforts.

Other legal services offices are involved in innovative work on behalf of herders, but much of the information regarding this activity was not being shared systematically among advocates. Colorado Legal Services created an e-mail list to facilitate cross-collaboration among advocates. Another example of recent collaboration among advocates is a joint challenge to the recently reissued Labor Department special procedures. The special procedures essentially leave the substandard living and working conditions for herders intact. The challenge seeks to vacate the special procedures under the Administrative Procedure Act on the basis that they were promulgated without notice-and-comment rulemaking.³⁷

C. Legal Representation

Colorado Legal Services provided traditional direct representation to herders. In particular, the organization engaged in agency advocacy with the Labor Department and litigated cases before the state and federal courts.

1. Agency Advocacy

When Colorado Legal Services started this project, the Labor Department had not investigated many ranchers in Colorado primarily because the Labor Department did not appear to provide much affirmative oversight and the herders themselves were not coming forward to file complaints.³⁸ The organization began filing every herder complaint with the agency. Using this administrative forum raised awareness and fostered collaboration between the organization and the Labor Department on the herder issue. Despite some obvious drawbacks, the organization recognized that agency advocacy could be faster and less resource-intensive in vindicating herder rights than relying solely on litigation.³⁹ The complaints with the Labor Department constitute a cumulative public record of misconduct by certain ranchers. Because filing complaints with the Labor Department has met numerous institutional challenges, the organization, through Freedom of Information Act requests, has been systematically reviewing the investigations conducted.⁴⁰ The long-term goal is to improve collaboration and agency enforcement.

³⁴Holmes et al., *supra* note 29, at 78 (staff members of programs funded by Legal Services Corporation (LSC) may participate in task forces with non-LSC entities to give information about critical issues that their clients are facing and how legislative change can resolve such issues).

³⁵H.B. 1407, 67th Leg., 2d Reg. Sess. (Colo. 2010). Many prior versions of the bill included protections for range workers; those protections were ultimately discarded in favor of the compromise legislation.

³⁶45 C.F.R. § 1612.6(a) (2011).

³⁷*Mendoza v. Solis*, No. 11-cv-01790 (D.D.C. filed Oct. 7, 2011). For information on the special procedures, see Employment and Training Administration, Training and Employment Guidance Letter No. 15-06, *supra* note 2.

³⁸The one notable exception was the Labor Department's investigation of the Peroulis ranch, during which numerous workers reported rampant abuses (Stuart Steers, *Meaner Pastures*, DENVER WESTWORD NEWS, Feb. 1, 2001, at 25, <http://bit.ly/AwvaOC>). More than a decade later, the Labor Department is still approving H-2A herders for the Peroulis ranch; meanwhile several workers have filed suit against the ranch for the same kind of mistreatment (Cardona, *supra* note 28).

³⁹The Labor Department conducts the investigations in a manner that protects the confidentiality of any complainant (29 C.F.R. § 501.6(b) (2011)).

⁴⁰Freedom of Information Act, 5 U.S.C. § 552(a).

2. Litigation

Because litigation is costly and time-consuming, Colorado Legal Services focused on litigating cases that would make the most impact for herders. To do so, the organization brought cases involving the most egregious facts, such as the denial of medical care, verbal abuse and threats of deportation, and the confiscation of personal documents, that characterized the inhumane treatment of the H-2A herders. Other criteria were that cases could be litigated in a favorable jurisdiction and that involved multiple plaintiffs who could increase not only public attention but also the chances of a broader remedy.⁴¹

Advocates can frame cases on behalf of herders in different ways. For example, advocates can use traditional tort law to allege false imprisonment, outrageous conduct, negligent infliction of emotional distress, and fraud. Colorado Legal Services studied the approach of national worker advocates and chose to reach ranchers' misconduct through novel litigation tools—the Trafficking Victims Protection Act and the Racketeer Influenced and Corrupt Organizations Act (RICO)—in addition to state tort law.⁴²

The Trafficking Victims Protection Act provides a private right of action that has a civil remedy for any violation of criminal laws on peonage, slavery, and human trafficking.⁴³ The Act covers the human-trafficking crimes of forced labor, traf-

ficking into servitude, and unlawful conduct with respect to documents.⁴⁴

Amendments to the Trafficking Victims Protection Act in 2008 clarified and expanded the scope of the Act: First, the amendments reinforced that actual physical force was unnecessary for the crime of forced labor. An employer, for example, could use coercion that caused a worker to believe that if the worker did not labor, “serious harm” would result, meaning “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious.”⁴⁵ The language allows for the consideration of the victim’s particular situation: “under all the surrounding circumstances” whether the harm is sufficiently serious “to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”⁴⁶ The concepts of “serious harm” and a person’s individual “circumstances” have proved significant in recent court decisions that have expanded the concept of nonphysical coercion.⁴⁷ Second, the amendments clarified that threatened abuse of the law was sufficient coercion if it was used “for any purpose for which the law was not designed, in order to exert pressure on another person.”⁴⁸ Multiple courts have reaffirmed that threats of deportation can amount to “abuse of the legal process” under the Trafficking Victims Protection Act.⁴⁹ Third, the private

⁴¹See, e.g., *Velasquez Catalan v. Vermillion Ranch Limited Partnership*, No. 06-cv-01043 (D. Colo. filed June 1, 2006); *Conovilca Matamoros v. Inda*, No. 10-cv-23 (Colo. Dist. Ct. Delta Cnty. filed Jan. 26, 2010); *Espejo Camayo v. John Peroulis and Sons Sheep Incorporated*, No. 10-cv-00772 (D. Colo. filed April 6, 2010); *Samaniego Fernandez v. John Peroulis and Sons Sheep Incorporated*, No. 11-cv-01132 (D. Colo. filed April 28, 2011).

⁴²Trafficking Victims Protection Act, 18 U.S.C. §§ 1581 *et seq.*; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*; see generally DANIEL WERNER & KATHLEEN KIM, *CIVIL LITIGATION GUIDE ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING* (3d ed. 2008).

⁴³18 U.S.C. § 1595.

⁴⁴*Id.* §§ 1589–1590, 1592.

⁴⁵*Id.* § 1589(c)(2).

⁴⁶*Id.*

⁴⁷See, e.g., *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008); *Shukla v. Sharma*, No. 07-CV-2972, 2009 U.S. Dist. LEXIS 90044, at *35 (E.D.N.Y. Aug. 21, 2009); *United States v. Dann*, No. 10-10191, 2011 U.S. App. LEXIS 15012, at *27–34 (9th Cir. July 22, 2011).

⁴⁸18 U.S.C. § 1589(c)(1).

⁴⁹See, e.g., *Nunag-Tanedo v. East Baton Rouge Parish School Board*, No. SACV 10-1172-AG (MLGx), 2011 U.S. Dist. LEXIS 50754, at *31 (C.D. Cal. May 11, 2011); *Velasquez Catalan v. Vermillion Ranch Limited Partnership*, No. 06-cv-01043-WYD-MJW, 2007 U.S. Dist. LEXIS 567, at *24 (D. Colo. Jan. 4, 2007); *United States v. Garcia*, No. 02-CR-1105-01, 2003 U.S. Dist. LEXIS 22088, at *23 (W.D.N.Y. Dec. 2, 2003).

right of action now reaches an employer who knowingly benefits financially from “participation in a venture,” which the employer knew or should have known was engaged in human trafficking.⁵⁰

A civil RICO violation, which provides for treble damages, can be established by showing that there has been an injury caused by a pattern of racketeering activity.⁵¹ Racketeering activity covers a number of crimes, called “predicate acts,” that have been defined at 18 U.S.C. § 1961. A pattern of racketeering activity requires the commission, at a minimum, of at least two predicate acts over the course of ten years.⁵² The injury must be economic as well as proximately caused by the predicate acts.

Several kinds of abuses by employers can constitute predicate acts that are actionable under civil RICO. The predicate act of mail and wire fraud can be based on false promises or material misrepresentations made about the job.⁵³ The predicate act of visa fraud can be used when H-2A employers make material misrepresentations on their applications.⁵⁴ Threats to induce economic fear, including threats of deportation, can constitute the predicate act of extortion under either 18 U.S.C. § 1951 or via a state law

equivalent of extortion under 18 U.S.C. § 1961(1)(A).⁵⁵ Civil RICO incorporates human-trafficking acts as predicate acts.⁵⁶

Both the Trafficking Victims Protection Act and RICO provide for attorney fees.⁵⁷ These provisions are a leverage for plaintiffs because LSC programs may now claim attorney fees so long as they are in compliance with the regulation related to fee-generating cases.⁵⁸

Many of these causes of action were pled, for example, in *Velasquez Catalan v. Vermillion Ranch Limited Partnership*, in which six cattle herders, alleging illegal and inhumane conditions, sued their employer.⁵⁹ The parties were able to reach a resolution where, in addition to monetary damages, the ranchers agreed to injunctive-type relief requiring them to implement changes, such as prohibiting the withholding of documents, requiring that the employer provide access to telephones and bathrooms, and facilitating worker travel outside the ranch. This result is but a small victory. Recognizing that reform through litigation is long term, the organization continues to be receptive to learning new litigation strategies.

⁵⁰18 U.S.C. §§ 1589(b), 1595(a).

⁵¹See *id.* § 1964(c) (2011). A plaintiff must also establish standing by properly asserting a “violation of [S]ection 1962.” The most common way to violate Section 1962 is by participation (*id.* § 1962(c)). Participation involves being employed or associated with any enterprise and conducting or participating in the conduct of such an enterprise’s affairs through a pattern of racketeering activity. Conspiracy involves conspiring to violate “[S]ection 1962.”

⁵²*Id.* § 1961(5). The pattern must have “continuity” and “relatedness,” meaning the predicate acts should have continued for a sufficiently long period and have similar purposes, results, participants, victims, or methods of commission or all such factors (*H.J. Incorporated v. Northwestern Bell Telephone Company*, 492 U.S. 229, 239–43 (1989)).

⁵³18 U.S.C. §§ 1341 *et seq.*; see, e.g., *David v. Signal International Limited Liability Company*, 588 F. Supp. 2d 718, 726 (E.D. La. 2008). The scheme to defraud must involve the use of the mail and wires, but the actual transmission can be incidental to the scheme (*Schmuck v. United States*, 489 U.S. 705, 710–11 (1989)).

⁵⁴18 U.S.C. § 1546; to obtain H-2A workers, employers are required to submit to the Labor Department an application signed under the penalty of perjury and certifying the job description and the lack of U.S. workers available for the job (see, e.g., *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1228 (S.D. Fla. 2011)).

⁵⁵See, e.g., *Nunag-Tanedo*, 2011 U.S. Dist. LEXIS 50754, at *44–45.

⁵⁶18 U.S.C. §§ 1581–92.

⁵⁷*Id.* §§ 1595(a), 1964(c).

⁵⁸Victor M. Fortuno, Interim President, Legal Services Corporation, Program Letter 10-1, Supplemental Guidance on Attorneys’ Fees (Feb. 18, 2010), <http://bit.ly/xtdTdj>; 45 C.F.R. § 1609.3 (2012).

⁵⁹See *Velasquez Catalan*, No. 06-cv-01043.



Colorado Legal Services would not have been able to succeed with any of this work if it were not for its clients. They commit to seeking justice not only for themselves but also for other herders. Although the organization meets roadblocks in seeking basic worker protections through the Shepherd Project, the organization learns how to reevaluate and adopt new strategies, such as increased outreach, collaborative efforts with partner organizations, and strategic litigation. The organization understands that change does not happen overnight and is com-

mitted to staying the course by responding to the legal needs of the workers who herd sheep, goat, and cattle out on the open range.

Author's Acknowledgments

I would like to thank Jenifer Rodriguez, Ignacio Alvarado, Thomas Acker, Kyle Endres, Katy Walker, Patricia Medige, Natasha Kerr, Kimi Jackson, and Linda Surbaugh, as well as our colleagues in other states who are doing groundbreaking work in this area. Many thanks to Patricia Medige, Kyle Endres, Linda Surbaugh, and Jenifer Rodriguez for their assistance on this article.



Subscribe to CLEARINGHOUSE REVIEW!

CLEARINGHOUSE REVIEW: JOURNAL OF POVERTY LAW AND POLICY is the advocate's premier resource for analysis of legal developments, innovative strategies, and best practices in representing low-income clients. Each issue of the REVIEW features in-depth, analytical articles, written by experts in their fields, on topics of interest to poor people's and public interest lawyers. The REVIEW covers such substantive areas as civil rights, family law, disability, domestic violence, housing, elder law, health, and welfare reform.

Subscribe today!

We offer two ways to subscribe to CLEARINGHOUSE REVIEW.

A **site license package** includes printed copies of each issue of CLEARINGHOUSE REVIEW and online access to our archive of articles published since 1967. With a site license your organization's entire staff will enjoy fully searchable access to a wealth of poverty law resources, without having to remember a username or password.

Annual site license package prices vary with your organization size and number of printed copies.

- Legal Services Corporation-funded programs: \$170 and up
- Nonprofit organizations: \$250 and up
- Law school libraries: \$500

A **print subscription** includes one copy of each of six issues, published bimonthly. Annual rates for the print-only subscription package are as follows:

- Legal Services Corporation-funded programs: \$105
- Nonprofit organizations: \$250
- Individuals: \$400

A print subscription for Legal Services Corporation-funded programs and nonprofit organizations does not include access to the online archive at www.povertylaw.org.

Please fill out the following form to receive more information about subscribing to CLEARINGHOUSE REVIEW.

Name _____

Organization _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

My organization is

- Funded by the Legal Services Corporation
- A nonprofit
- A law school library
- None of the above

What is the size of your organization?

- 100+ staff members
- 51-99 staff members
- 26-50 staff members
- 1-25 staff members
- Not applicable

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602

CUT HERE