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Human Trafficking: The Silent Risk

Every year, hundreds of thousands of men, women and children are trafficked worldwide, according to the Department of Homeland Security. The recent media attention surrounding human trafficking has shed light on the latest efforts to expose the extreme depths of the transnational epidemic, one that has existed for more than a century. Trafficking can take many forms and includes those who are forced to engage in involuntary sex acts (sex trafficking) as well as those who are forced to work (labor trafficking) under threats of violence or by other means such as accumulated debt, passport retention, or threats of being reported to immigration authorities. Recently, we have seen an uptick in civil liability arising from trafficking events, and these claims are cropping up against software developers, web providers, hoteliers, and other retailers and manufacturers. Because of the increase in these newfangled filings, which secondarily exploit trafficked victims, the industry faces a new frontier and must be trained and educated on how to respond to such claims. Reduced to their most basic form, these claims sound in premises liability and negligent training and retention, and the plaintiffs' bar seeks to hold unwitting and unknowing business owners liable for damages resulting from these unforeseeable acts. Not surprisingly, these cases turn on notice and foreseeability, the cornerstone of all premises cases, but unlike many traditional premises cases, the trafficking acts are hidden and clandestine, making it exceedingly difficult for police personnel, the courts and business owners to spot, let alone thwart this crime even with the most extensive and sophisticated surveillance. To hold retail establishments liable for third-party criminal acts under these circumstances is wrong and contrary to long-established premises liability law. The purpose of this article is to provide insight into how businesses, particularly hotels, can navigate these new claims.

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I. What Is Human Trafficking?

The first step in helping combat this problem is understanding the type of acts that are considered to be human trafficking. Human Trafficking, as defined by Article 3, paragraph (a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, is the:

[R]ecruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

Trafficking is not always akin to what is portrayed by Hollywood, but instead takes many forms and includes those who are forced to work under threats of violence or by other means such as accumulated debt, passport retention, or threats of being reported to immigration authorities. Human trafficking primarily exists in the labor area and also includes forced prostitution. Not surprisingly, labor trafficking surfaces in manual labor-intensive industries, particularly those that rely on third parties to provide inexpensive labor. Construction, domestic services, agriculture, mining, forestry, fishing and manufacturing are vulnerable to such claims, whereas sex trafficking claims arise against hotels, strip clubs, hotel franchisors, website host providers, website software providers, dating sites, massage parlors and nail salons. Indeed, the anti-trafficking advocacy organization Polaris Project recorded more than 3,300 cases of trafficking in hotels over the past ten years.

II. Become Familiar With the Human Trafficking Law(s) That Apply to the Business

States are beginning to enact legislation. For example, California's governor approved SB 970, enacted as Section 12950.3 to the Government Code. The new California law requires hotels and motels subject to the Fair Employment and Housing Act (FEHA) to provide at least twenty (20) minutes of classroom or other effective interactive training and education regarding human trafficking awareness to each employee who is likely to interact or come into contact with victims of human trafficking. Indeed, the author and expert Kimberly Mehlman-Orozco, Ph.D., completed a video intended to train businesses on this topic and was in line with new California law. Importantly, the new law provides that beginning on January 1, 2020, an employer must provide human trafficking awareness training and education once every two years to each employee likely to interact or come into contact with victims of human trafficking. Those employees include, but are not limited to, employees who have reoccurring interactions with the public, e.g., employees who work in a reception area, perform housekeeping

duties, help customers in moving their possessions or drive customers. The mandatory training must include: (1) the definition of human trafficking and commercial exploitation of children (addressed *supra* at section I); (2) guidance on how to identify individuals most at risk for human trafficking (addressed *infra* at section III); (3) the difference between labor and sex trafficking as it applies to the hotel sector (addressed *supra* at section I); (4) guidance on the role of hospitality employees in reporting and responding to this issue (addressed *infra* at sections VIII-IX); and (5) contact information of appropriate agencies (addressed *infra* at section X). Cal. Civ. Code § 52.6(e) also mandates that by January 1, 2021, businesses that operate an intercity passenger-rail, light-rail or bus station shall provide at least twenty (20) minutes of training to its new and existing employees who may interact with or come into contact with a victim of human trafficking or those who are likely to receive, in the course of their employment, a report from another employee about suspected human trafficking. The requisite training will provide information on recognizing the signs of human trafficking and how to report those signs to the appropriate law enforcement agency.

III. Learn the Signs of Human Trafficking

There is no silver bullet and human trafficking is regularly misidentified, which is why this training becomes essential. The hope is that through training, retailers can increase the correct identification of the crime and diminish the many false positives that are reported yearly. Human trafficking can happen in any community and its victims can be any age, race, gender or nationality. Traffickers can be men and women. They use violence, manipulation, or false promises of well-paying jobs or romantic relationships to lure victims into trafficking. Consumers of labor and sex services come from all walks of life. Human trafficking is well hidden: victims will most likely dress in street clothes, and their traffickers may appear to be their boyfriend, significant other, family member or friend.

Human trafficking signs include: nervous behavior, guests with large amounts of cash, tipping front desk staffers, guests who ask for rooms far from the front desk, excessive phone calls to and from the room, excessive cell phones in the room, excessive tablets or phones in the room, and multiple male guests going to one room. In general, a guest that comes to the front desk every day asking for toiletries should not be an issue, but coupled with some of these other red flags, could be a sign of human trafficking. Also, be mindful of foot traffic on the premises and/or vehicle traffic near rooms, especially if it has outward-facing doors. Foot traffic may also come from adjacent parking lots. Be vigilant of one man traveling with several women or one man registered to a room with several females. Look for adjoining rooms being booked together and flanking rooms being registered to yet another person,

which may indicate that the flanking rooms are being used to sound proof the adjoining rooms where the illegal activity is taking place.

There is a recognized legal right of privacy behind a closed hotel door, depending on the jurisdiction; however, know that there is no right of privacy in terms of trash. Tell the housekeeping staff to report if they see excessive condoms, needles, or other drug paraphernalia. Implement a policy requiring housekeeping to clean rooms every certain amount of days if only to assure cleanliness. A guest may decline for a period of time but, at some point, housekeeping must be permitted to enter the room. Publish the policy as part of the literature provided at check-in. If access to a room is declined repeatedly, have housekeeping report this to management and document same. In addition, business owners should be aware of seasonal traffic, construction jobs in the area, other similar hotels and/or trafficking claims at nearby establishments. Look for extended stays that are booked from day to day, or guests who come to the front desk daily to request toiletries.

It bears repeating that no single one of these signs is a definitive indication of human trafficking, and it's important to consider the totality of the circumstances. Do not confront guests, or allow employees to take the law into their own hands, or make accusations regarding any of the individuals involved in a suspected trafficking act. Engage law enforcement.

ACTIVATE

IV. Consistently Execute on the Protocol of the Employer/Franchisor

If a business finds itself in the crosshairs of litigation, it becomes very important to the defense that the business has followed its own protocols, even if those protocols have no causal connection to the acts giving rise to the alleged trafficking. The reptile theory is alive and well in these cases, and therefore, following protocols and procedures becomes essential to the defense. If the business is required to keep notes at the hotel front desk, do so. If there is a blacklist of guests who are not allowed on the premises, follow through and make sure the list is current, but make sure to consult with an attorney first regarding the legality of keeping such a list. Consider blocking certain web access (e.g. dark web, commercial sex advertisement, and the like) from the hotel's free Wi-Fi. Have all new employees and contractors trained at every level of the company, and make the training an annual requirement. Create a policy where facts only (and not opinion) are included in written documents maintained in the usual course of business. Retain notes, minutes, conclusions and records of any administrative and/or

property management meetings consistent with the state's records retention policy. Failing to produce documentation can lead to spoliation jury instructions at trial.

V. Re-visit Security Measures at the Premises

Security is a focus in corporate designee depositions in these cases. For example, if they have security cameras on the premises, make certain that they are pointed to the right areas, that they are functioning properly, and that the footage is maintained for a reasonable period of time, such as more than twenty-four (24) hours. Making a determination of what is "reasonable" can be challenging; that includes decisions relating to video looping, back-up tapes, and cloud-based storage. Can the business see foot traffic with the cameras? If not, they need to be adjusted. Can they see all room entrances and hallways with the cameras? Monitor the cameras that are on computer screens regularly at the front desk. Remember, if a business is implementing a security protocol, they must do so in a reasonable, non-negligent manner. Consider having an employee or contractor patrol or walk the premises periodically. Consider hiring private security; although, this is not yet the required standard of care.

VI. Implement Other Preventative Policies

Successful defense of these cases requires the business owner to have situational awareness at all times. For example, in the hotel arena, be aware of hotel guests paying in cash daily, who is having breakfast at the hotel, whether any children are being brought in for free breakfast who are not guests, excessive visitors in the room, or visitors who come at off hours. Document the names of guests and visitors in a guest folio at the front desk and obtain each person's driver's license information so long as the jurisdiction's privacy laws permit retention of same. Do not permit elevator access without a guest room key. Limit the number of people in a hotel room to no more than two (2) to four (4) adults or two (2) adults and two (2) children. Consider requiring all visitors to check in at the front desk, requiring all vehicles to obtain a parking pass, and limiting visitors on the property from 10:00 p.m. to 6:00 a.m. Post signage that the premises is being monitored and consider posting signage regarding combating human trafficking. Consider discontinuing "do not disturb" cards outside doors.

Have an employee manual, written protocols, training materials and/or guidelines and have the employees acknowledge in writing that they understand and will follow the manual. In the context of hotels, these manuals should address housekeeping, security, surveillance cameras, suspicious behavior, human trafficking, guest interactions, reservations, whether photo identification is required, age requirements for renting rooms, alcohol on the premises and parties in the room and/or conference

rooms, and the number of guests and friends allowed in a room. Where applicable, a business should also address inspections and the division of labor between the company and its franchisor, if applicable, as well as any training offered by the franchisor in these areas.

Enforce rules created by the hotel consistently, including the rates they charge its guests. Guests who are given discounts draw the attention of plaintiffs' lawyers who seek to paint a picture of some sort of relationship between business staff and traffickers. Plaintiffs' bar loves to point out any inconsistencies in enforcement to advance their cases.

VII. Notice and Foreseeability Are Key

At their heart, human trafficking cases are premises liability cases. In any premises case, the key issues are notice and duty. If a business is on notice of trafficking, the business has a duty to act. Plaintiff's counsel goal, then, is to show that they either had notice or that trafficking was foreseeable on the premises. Plaintiff will look for prior criminal incidents on the premises to show that this crime was foreseeable. This underscores why it is important to be familiar with the police call log relating to the business's property. Any individual can access the call log at the local police station by a Public Information Act request. Plaintiff's counsel will use prior alleged criminal acts, regardless of whether they involve human trafficking, to show that the hotel or business knew or should have known that human trafficking was happening (or was foreseeable) on the premises. By being vigilant with respect to these records, businesses inform future conduct and hopefully pre-empt unnecessary phone calls to the police where possible or allegations of a "disorderly house." The admissibility of this evidence in these cases depends on the jurist and case law in the applicable jurisdiction.

VIII. Prevent Negligent Hiring, Retention, and Supervision Claims

These cases include negligent hiring, retention and supervision claims. Therefore, it becomes critical for businesses to do their due diligence on applicants—again within the confines of local law. Simply put, they should know who they are hiring. Research any criminal background, online presence, and reasons for dismissal(s) from prior employers of applicants. Training of human resources is essential for insurance purposes, lawsuit purposes, the hotel's reputation, and the safety of invitees on the premises. As provided in the California statute, Cal. Gov. Code 12950.3 recommends training using materials and information provided by the Department of Justice, the Blue Campaign of the Department of Homeland Security, and private nonprofit organizations that represent the interests of victims of human trafficking. Some of those organizations and their contact information are listed below:

- Freedom Light, LLC - <https://www.freedomlight.org>
- Safe House Of Hope - <http://safehouseofhope.org>

Be wary of employees who break the rules. The breach could be wholly unrelated to human trafficking, but a crafty plaintiff's lawyer will use that history to argue negligent hiring and retention to buttress their premises cases arising from alleged human trafficking.

REPORT

IX. Work With Law Enforcement and Stay Vigilant

Businesses should cooperate with law enforcement; however, it is important to be mindful of over-reporting, as anyone can obtain a copy of call logs to the police from a particular individual or establishment pursuant to a Public Information Act Request. Over-reporting can result in a business getting a reputation of being a disorderly establishment. Monitor the company's reputation in the community and make sure they are aware of any media attention, particularly attention that presents the establishment in a negative light. Monitor TripAdvisor and other online review websites, and address them with the customer, the police, and with any franchisor.

As basic as it may seem, the more monitored and vigilant employees are, the less likely the premises is to be a target for human trafficking. Have the police and fire personnel numbers accessible at all times at the front desk for staff. They should not have to search for same. Have hotel security monitor commercial sex advertisements and review websites for reports of business. Websites such as USSextratrafficking.com rate hotel front desks with respect to visitor's ability to bypass same. Ask guests for a phone number upon check in, and search the phone number for listings on commercial sex advertisement or review websites.

X. Provide Guests and Staff With Contact Information of Appropriate Agencies

Consider providing guests with a human trafficking hotline phone number, and establish referral relationships with local service providers for trafficking victims. If anyone sees something, then they need to say something to the hotel managers or call the police. For immediate assistance, call the National Human Trafficking Hotline at 1-888-373-7888. They can reach the hotline 24 hours a day, 7 days a week in more than 200 languages. Calls are confidential and answered by trained "Anti-Trafficking Hotline Advocates." The California statute also requires that the telephone numbers of the appropriate local law enforcement agencies be provided as part of the employee training.