

**REVISED PROPOSED EMERGENCY AMENDMENT: HUMAN TRAFFICKING
(Proposed Amendment 4 of Use Friendly Volume Two)**

Synopsis of Proposed Amendment: *This revised emergency amendment implements the directive found at section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386.*

The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. §§ 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission is also directed to consider how to address four new statutes: 18 U.S.C. § 1589 (Forced Labor); 18 U.S.C. § 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 18 U.S.C. § 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).

Specifically, the Commission is directed to "review and, if appropriate, amend the sentencing guidelines applicable to . . . the trafficking of persons including . . . peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act."

The Commission is directed to "take all appropriate measures to ensure that these sentencing guidelines . . . are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses." The Commission is also directed to "consider providing sentencing enhancements" in cases which involve: (A) a large number of victims; (B) a pattern of continued and flagrant violations; (C) the use or threatened use of a dangerous weapon; or (D) the death or bodily injury of any person.

To address this multi-faceted directive, this revised amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.), a criminal violation of the Act is only a Class B misdemeanor. See 29 U.S.C. § 216. Thus, the guidelines are not applicable to those offenses.

The revised amendment references the new offense at 18 U.S.C. § 1591 to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are more analogous to the offenses referenced to the prostitution guideline.

This revised amendment differs from the Federal Register version in that it deletes the proposed amendments to the age enhancements in §2G1.1(b)(2) and §2G2.1(b)(1), which originally were proposed in response to increased penalties provided by 18 U.S.C. § 1591 for transporting persons under the age of 14 years. The proposed age enhancements have been deleted because they are unnecessary given the existing age enhancements and multiple cross-references already contained in §2G1.1. More importantly, adding these age enhancements would disrupt the proportionality among the sex offense and pornography guidelines.

The special instruction in the published version at §2G1.1(d)(2) has been deleted because it is unnecessary given the proposed inclusion in §2X1.1 of §§2G1.1 and 2G2.1 as offense guidelines that expressly cover attempts if the defendant is convicted of an attempt to commit an offense under 18 U.S.C. § 1591.

This revised amendment also deletes the proposed application note in §§2G1.1 and 2G2.1 that would provide an encouraged upward departure if the offense "involved substantially more than [6][10][25] victims." The proposed application note has been deleted because the current "special instruction" at §2G1.1(d)(1) provides incremental punishment if there are multiple victims. In cases in which the court finds that the special instruction at §2G1.1(d) does not provide sufficient incremental punishment, the Background Commentary of §3D1.4 and §5K2.21 (Dismissed and Uncharged Conduct) provide sufficient guidance regarding upward departures in these cases.

Section 1591 cases have been alternatively referred in Appendix A to §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material). This has been done in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at §2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, commercial pornography.

The revised amendment conforms to the view that §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. §§ 1581, 1583, and 1584. Section 2H4.1 is also designed to cover offenses under three new statutes, 18 U.S.C. §§1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor services of another by abusing or threatening abuse of the law or the legal process. See 18 U.S.C. §1589. Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of §§ 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to these offenses), 1591 (sex

trafficking of children by force, fraud or coercion), or 1594(a) (attempts to violate these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors which have been traditionally sentenced under §2H4.1.

The revised amendment provides an alternative, less punitive base offense level of 15 for those who violate 18 U.S.C. § 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence set for section 1592 offenses (i.e., 5 years). The revised amendment proposes level 15 as the appropriate level because similar offenses involving documents are punishable at level 15 under §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship or Legal Resident Status or a United States Passport).

Section 2H4.1(b)(2) has been expanded to provide a 2-level increase if a dangerous weapon was brandished or its use was threatened. Currently, only actual use of a dangerous weapon is covered. This change reflects Congress's directive to consider an enhancement for the "use or threatened use of a dangerous weapon." The commentary to §2H4.1 is amended to clarify that the threatened use of a dangerous weapon applies regardless of whether a dangerous weapon was actually present.

This revised amendment deletes an enhancement at §2H4.1(b)(3), for offenses involving multiple victims and the accompanying changes to the encouraged departure provision in Application Note 3. The enhancement has been deleted because Application Note 3 to §2H4.1 already encourages upward departure in cases involving more than 10 victims.

The revised amendment also adds §2H4.1 to the list of guidelines in §2X1.1 that expressly cover attempts and conspiracies. This change implements Congress's direction in 18 U.S.C. § 1594 that "whoever attempts to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591 shall be punishable in the same manner as a completed violation of that section." With the exception of section 1591, all the specified statutes are referenced to §2H4.1. Conforming amendments are made to the title of §2H4.1.

*The revised amendment creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to Congress's directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years imprisonment for subsequent offenses, currently are not referred to any specific guideline. The Department of Justice and Department of Labor both recommend creation of a discrete guideline for these offenses. The revised amendment provides a base offense level of 6 in recognition of the low statutory maximum sentences set for these cases by Congress. Further, these offenses typically involve violations of regulatory provisions. Setting the base offense level at level 6 provides consistency with guidelines for other regulatory offenses. *See, e.g.*, §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic,*

or Agricultural Product) and 2N3.1 (Odometer Laws and Regulations). Proposed §2H4.2(b)(1), an enhancement for bodily injury, and §2H4.2(b)(2), an enhancement applicable to defendants who commit the instant offense after previously sustaining a civil penalty for similar misconduct, have been established to respond to the directive that the Commission consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This revised amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The revised amendment amends §5E1.1 (Restitution) to include a reference to 18 U.S.C. § 1593 in the guideline provision regarding mandatory restitution.

Proposed Amendment:

§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

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Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 1591, 2421, 2422, 2423(a), 2425.

Application Notes:

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2. Subsection (b)(1) provides an enhancement for physical force, or coercion, that occurs as part of a prostitution offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

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Background:

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This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (1) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (2) the person (A) had not attained the age of 18 years; and (B) will be caused to engage in a commercial sex act.

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed

Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

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Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a), (b), (c)(1)(B), 2260.

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§2H4.1. Peonage, Involuntary Servitude, and Slave Trade; Attempt or Conspiracy

- (a) Base Offense Level (Apply the greater): ~~22~~
- (1) **22**; or
 - (2) **15**, if the defendant was convicted of an offense under 18 U.S.C. § 1592.
- (b) Specific Offense Characteristics
- (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if any victim sustained serious bodily injury, increase by **2** levels.
 - (2) If (A) a dangerous weapon was used; or brandished, or (B) the use of a dangerous weapon was threatened, increase by **2** levels.

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Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-~~1588~~1590, 1592.

Application Notes:

1. For purposes of this guideline—

"A dangerous weapon was used" means that a firearm was discharged, or that a firearm or dangerous weapon was otherwise used. "The use of a dangerous weapon was threatened" means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.

Definitions of "firearm," "dangerous weapon," "otherwise used," "serious bodily injury," and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).

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§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

Commentary

Application Notes:

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1. *Offense guidelines that expressly cover attempts include:*

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§2G1.1 (if the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591 (See 18 U.S.C. § 1594(a));
§2G2.1 (if the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591 (See 18 U.S.C. § 1594(a));
§2H4.1;
§2N1.1;
§2Q1.4.

Offense guidelines that expressly cover conspiracies include:

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§2H1.1, §2H4.1;
§2T1.9.

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 241	2H1.1, 2H2.1, 2H4.1
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18 U.S.C. § 1588	2H4.1
18 U.S.C. § 1589	2H4.1
18 U.S.C. § 1590	2H4.1
18 U.S.C. § 1591	2G1.1, 2G2.1
18 U.S.C. § 1592	2H4.1
18 U.S.C. § 1621	2J1.3

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§2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

- (1) If the offense involved (i) serious bodily injury, increase by **4** levels; or (ii) bodily injury, increase by **2** levels.
- (2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct,

increase by 2 levels.

Commentary

Statutory Provision: 29 U.S.C. § 1851.

Application Notes:

1. Definitions.—For purposes of subsection (b)(1), "bodily injury" and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 et. seq.).

APPENDIX A - STATUTORY INDEX

29 U.S.C. § 1141	2B3.2, 2F1.1	* * *
29 U.S.C. § 1851	2H4.2	

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§5E1.1. Restitution

(a) In the case of an identifiable victim, the court shall --

- (1) enter a restitution order for the full amount of the victim’s loss, if such order is authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, § 2327, § 3663, or § 3663A; or

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Commentary

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Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.