

PROPOSED AMENDMENT: HUMAN TRAFFICKING

Synopsis of Proposed Amendment: *This amendment implements the directive found at section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the “Act”), Pub. L. 103–386.*

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 proposed amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act.¹

The proposed amendment references the new offense at 18 U.S.C. § 1591 to U.S.S.G. §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 punishes a

¹Although 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.

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, both staff and the Department of Justice suggest that section 1591 offenses are analogous to the offenses referenced to the prostitution guideline.

Section 2G1.1(b)(2) is proposed to be amended to include a 6-level increase for victimization of children who have not attained the age of 12, a 4-level increase for victimization of children who have not attained the age of 14, and a 2-level increase for children who have not attained the age of 16. This change increases by 2 levels the punishment for victimization of a child under 12 and creates an additional category of victims – children between the ages of 12 and 14. These changes were made in recognition of Congress's distinction in section 1591 between offenses involving minors under 14 (statutory cap of "any term of years or life") and offenses involving minors between 14 and 18 years of age (statutory cap of "not more than 20 years"). This change harmonizes the guidelines to the penalties of section 1591 and is supported by the Department of Justice.

The special instruction at §2G1.1(d)(2) has been added to ensure that attempts to violate section 1591 are not to be referred to §2X1.1 (Attempt, Solicitation, or Conspiracy). This change implements Congress's direction in 18 U.S.C. § 1594 that "whoever attempts to violate section...1591 shall be punishable in the same manner as a completed violation of that section."

An additional application note – Application Note 12 – has been added to §2G1.1 to provide an encouraged upward departure when an offense "involved substantially more than [10] victims." This encouraged upward departure was added in response to Congress's directive that the Commission consider enhanced sentencing in cases which involve "a large number of victims." A departure note is provided, rather than an enhancement, because of the current special grouping rule in subsection (d)(1) regarding multiple victims that requires that counts involving different victims not be grouped.

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 involve both specific harm to an individual victim and further an additional criminal purpose, commercial pornography. In the interest of consistency and proportionality, the same changes have been made to §2G2.1 as those discussed above for §2G1.1.

Both staff and the Department of Justice believe 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 they did not perform the labor or services, they 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 sections §§ 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 proposed amendment provides an alternative, less punitive base offense level 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 (5 years) by Congress. Staff suggests 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) (BOL of 11 plus 4 from enhancement).

Section 2H4.1(b)(2) has been expanded to provide a 2-level increase for threatened use of a dangerous weapon with an increase to 4 levels for actual use. Currently, only actual use is covered. This change reflects Congress's directive to consider an enhancement for the "use or threatened use of a dangerous weapon."

Section 2H4.1(b)(3) has been created to provide an enhancement for offenses involving more than 10 victims. This change reflects Congress's directive to consider an enhancement for cases "involving a large number of victims." Also, §2H4.1, Application Note 3, which formerly provided an encouraged upward departure for offenses involving more than 10 victims, has been altered to encourage departure "if the offense involved substantially more than 10 victims."

Finally, with respect to amendments to §2H4.1, the proposed amendment 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 section 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.

A new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), has been created 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 advocate creation of a discrete guideline for these offenses. The proposed base offense level (level 4) has been proposed in recognition of the small statutory maximum sentences set for these cases by Congress. Similarly, §2H4.2(b)(1), an enhancement for risk of bodily injury, and §2H4.2(b)(2), an enhancement for offenders who commit their offenses after previously sustaining a civil penalty for similar misconduct, have been established to respond to Congress’s directive that the Commission consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice and the Department of Labor’s concern regarding prior administrative and civil adjudications.

Proposed Amendment:

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

(a) Base Offense Level:

- (1) **19**, if the offense involved a minor; or
- (2) **14**, otherwise.

(b) Specific Offense Characteristics

* * *

- [(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by ~~46~~ levels; or (B) attained the age of 12 years but not attained the age of ~~16~~14 years, increase by ~~24~~ levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by **2** levels.]

* * *

(d) Special Instruction

* * *

- (2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591, do not apply §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

* * *

Commentary

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

Application Notes:

* * *

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.

* * *

- [12. Upward Departure.—If the offense involved substantially more than [10] victims, an upward departure may be warranted.]

Background: This guideline covers offenses under chapter 117 of title 18, United States Code. Those offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under §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), §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).

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 (A) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (B) the person (i) had not attained the age of 18 years; and (ii) 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

* * *

(b) Specific Offense Characteristics

- [(1) If the offense involved a victim who had (A) not attained the age of 12 years, increase by ~~46~~ levels; or (B) attained the age of 12 years but not attained the age of ~~16~~14 years, increase by ~~24~~ levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by 2 levels.]

* * *

(c) Special Instruction

* * *

- (2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591, do not apply §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

* * *

Commentary

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

Application Notes:

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- [6. Upward Departure.—If the offense involved substantially more than [10] victims, an upward departure may be warranted.]

* * *

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

(a) Base Offense Level: ~~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 (i) a dangerous weapon was used, increase by **24** levels; or (ii) the use of a dangerous weapon was threatened, increase by **2** levels.]

- [(3) If the offense involved more than [10] victims, increase by **[2][4]** levels.]

- ~~(3)~~(4) * * *

- ~~(4)~~(5) * * *

Commentary

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

* * *

3. ~~If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted. Upward Departure.—If the offense involved substantially more than [10] victims, an upward departure may be warranted.~~

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

Commentary

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Application Notes:

1. *Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.*

Offense guidelines that expressly cover attempts include:

§§2A2.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.2, 2A5.1;
§§2C1.1, 2C1.2;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2E5.1;
§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));
§2H4.1;
§2N1.1;
§2Q1.4.

Offense guidelines that expressly cover conspiracies include:

§2A1.5;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2H4.1
§2H1.1;
§2T1.9.

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APPENDIX A - STATUTORY INDEX

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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

* * *

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

- (a) Base Offense Level: [4]
- (b) Specific Offense Characteristics
 - (1) If the offense involved the risk of (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