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Caring for Those Who Care for Us: A Call for Greater Legislative Protections for Foreign-Educated Nurses

Rebecca Odelius

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CARING FOR THOSE WHO CARE FOR US: A CALL FOR
GREATER LEGISLATIVE PROTECTIONS FOR FOREIGN-
EDUCATED NURSES

*Rebecca Odelius**

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I. INTRODUCTION

Eden Selispara's journey to the United States began in the Philippines in 2013, when she first signed a contract with Management Health Systems, a nationally-known health staffing agency better known as MedPro.¹ Selispara, a foreign-educated nurse (FEN), arrived in South Florida on January 7, 2017, eager to begin work.² Instead, she found herself unemployed, forced to live in a three-bedroom apartment with eight other workers, and waiting for two months for the job she was contractually promised.³

According to Selispara, "[W]hen she confronted MedPro staff about her concerns regarding her lack of employment, MedPro employees threatened to report her to United States immigration officials for fraud and threatened 'financial consequences' if she didn't continue to wait for an assignment, without being paid wages."⁴ In March of 2017, when Selispara informed MedPro she was moving from Florida to Texas to look for other employment, MedPro filed suit in Broward County Circuit Court, claiming more than \$150,000 for damages and breach of contract.⁵ Selispara eventually filed a countersuit under state and federal law that resulted in a settlement agreement on August 9, 2018.⁶ While neither side ultimately admitted any misconduct, the settlement agreement did require MedPro to pay its contractually agreed upon wage to all

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1. *As a Result of Lawsuit, Florida Health Staffing Agency MedPro to Modify Employment Practices for Foreign-Educated Health Care Professionals*, PUB. CITIZEN (Aug. 9, 2018), <https://www.citizen.org/news/as-a-result-of-lawsuit-florida-health-staffing-agency-medpro-to-modify-employment-practices-for-foreign-educated-health-care-professionals/> [<https://perma.cc/5DQH-3CKN>] [hereinafter *Employment Practices*].

2. *See* Ron Hurtibise, *Sunrise Firm Settles Suit with Nurse Who Claimed She Was Threatened with 'Immigration Fraud' Charges*, SUN SENTINEL (Aug. 10, 2018), <https://www.sun-sentinel.com/business/fl-bz-medpro-recruitment-firm-agrees-to-modify-policies-20180809-story.html> [<https://perma.cc/9G8M-JYYG>].

3. *See Employment Practices*, *supra* note 1.

4. *Id.*

5. *See* Hurtibise, *supra* note 2; *Employment Practices*, *supra* note 1.

6. *See* Hurtibise, *supra* note 2.

recruited FENs, even while they waited for employment.⁷ MedPro “also agreed to limit to \$40,000 the amount of money it will seek from recruits for breaching employment contracts.”⁸ Finally, MedPro promised to “modify its hiring practices so that nurses and other health care professionals better understand the terms of any contracts they are presented with, that nurses are paid for time spent in mandatory training and orientation, and that lawsuits or reporting to immigration are not used as threats.”⁹

Selispara is just one of thousands of FENs recruited to the United States each year to provide relief for the growing shortage of nurses occurring across the nation.¹⁰ Taking into account the COVID-19 crisis,¹¹ as well as an aging population,¹² FENs are needed in the United States now more than ever.¹³ Unfortunately, like Selispara, many FENs are still left vulnerable to egregious labor trafficking and stringent contract terms,¹⁴ like exorbitant breach fees.¹⁵ FENs enjoy limited protections from the personal and legal perils of labor trafficking and contractual breach fee litigation.¹⁶ However, despite

7. *Id.*

8. *Id.*

9. *Employment Practices*, *supra* note 1.

10. Barbara L. Nichols et al., *International Models of Nursing*, in *THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH* 565, 566 (2011).

11. See Usha Lee McFarling, *Coronavirus Taking Outsized Toll on Filipino-American Nurses*, STAT (Apr. 28, 2020), <https://www.statnews.com/2020/04/28/coronavirus-taking-outsized-toll-on-filipino-american-nurses/> [<https://perma.cc/9N74-4EN8>]; Felicia Stokes & Renata Iskander, *Human Rights and Bioethical Considerations of Global Nurse Migration*, 18 J. BIOETHICAL INQUIRY 429, 430 (2021).

12. Stokes & Iskander, *supra* note 11, at 429–30.

13. *Id.* at 430.

14. See Trafficking Victims Protection Reauthorization Act (TVRA), 22 U.S.C. § 7102 (11)(B) (defining “labor trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”). See generally Heather McAdams, Comment, *Liquidated Damages or Human Trafficking? How a Recent Eastern District of New York Decision Could Impact the Nationwide Nursing Shortage*, 169 U. PA. L. REV. ONLINE 1, 1 (2020) (discussing the possibility of contract provisions rising to the level of labor trafficking).

15. See Patricia Pittman & Adam R. Pulver, *Unethical International Nurse-Staffing Agencies—The Need for Legislative Action*, 382 NEW ENG. J. MED. 793, 794 (Feb. 27, 2020), <https://www.nejm.org/doi/10.1056/NEJMp1913727> [<https://perma.cc/LUU3-ZY2X>].

16. See discussion *infra* Section II.B.

the few favorable court decisions and recent legislative provisions,¹⁷ much more needs to be done.

This comment lays out the already existing protections for FENs,¹⁸ the shortcomings of those protections,¹⁹ and what needs to be done for FENs to enjoy the same occupational protections as nurses born and educated in the United States.²⁰ Part II gives a brief history of the recruitment of FENs to the United States and discusses the legislative and current case law protections provided for FENs.²¹ Part III articulates why FENs are needed in the United States, analyzes the shortcomings of the current protections provided for FENs, and argues why greater protections are still needed.²² Lastly, Part IV suggests proposed legislative solutions to the ongoing issues and reiterates the importance of more ethical recruitment practices of FENs.²³

II. BACKGROUND

A. *History of Recruitment of FENs to the United States*

For more than fifty years, the United States has heavily relied on FENs to fill in the gaps caused by a national nurse shortage.²⁴ Most FENs recruited to the United States originate from the Philippines, the United Kingdom, India, Nigeria, and Ireland.²⁵ However, roughly seventy-three percent of FENs in the United States are from the Philippines,²⁶ making up nearly four percent of the entire nursing population.²⁷

17. See discussion *infra* Section II.B.

18. See discussion *infra* Section II.B.

19. See discussion *infra* Section III.C.

20. See discussion *infra* Part IV.

21. See discussion *infra* Part II.

22. See discussion *infra* Part III.

23. See discussion *infra* Part IV.

24. Stokes & Iskander, *supra* note 11, at 429.

25. Nichols et al., *supra* note 10, at 582.

26. See *id.* at 582. See also Julian Glover, 'None of Us Signed Up to Die': Filipino American Nurses Disproportionately Impacted by COVID-19, ABC 7 CHIC. (May 10, 2021), <https://abc7chicago.com/filipino-americans-nurses-covid-deaths-nurse-sacrifices-registered-dead-from/10557478/> [<https://perma.cc/939F-373M>] (exploring historical "harmful colonial relationships economically, socially, and politically" between the United States and the Philippines); Paulina Cachero, *How Filipino Nurses Propped Up America's Medical System*, TIME (May 30, 2021), <https://time.com/6051754/history-filipino-nurses-us/> [<https://perma.cc/RZ8X-LTPM>] ("[H]ow migrant Filipino health care workers came to play such an integral role in the U.S. medical system is a complicated story").

27. Glover, *supra* note 26.

Traditionally, healthcare organizations utilize three common models to recruit FENs to the United States: (1) the direct model, (2) the placement model, and (3) the staffing model (also called the lease model).²⁸ The direct model is used by healthcare organizations that recruit FENs without the use of third-party agencies.²⁹ The FENs contract directly with the organizations or hospitals.³⁰ The average cost to bring one FEN to the United States using the direct model is roughly \$5,000 to \$12,000.³¹

In the placement model, healthcare organizations use vendors to recruit FENs.³² Vendors and healthcare organizations negotiate fees that range from \$15,000 to \$20,000 for each FEN.³³ The placement model is the most commonly utilized model in recruitment and is preferred by most FENs and health care organizations.³⁴ FENs “feel as though they are treated more like American nurses in this model, and the CNOs [chief nursing officers] can invest in training and integration from the outset.”³⁵

The third, and by far most lucrative, recruitment model is the staffing model—sometimes referred to as the lease model.³⁶ In these instances, a staffing agency (such as MedPro) undertakes the responsibilities of recruiting nursing personnel, navigates the immigration process, and charges the health care organizations an hourly rate anywhere from \$60 to \$80 per FEN.³⁷ In other words, the

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28. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., RESOURCE MANUAL ON THE LICENSURE OF INTERNATIONALLY EDUCATED NURSES 29 (2020). See also Patricia M. Pittman et al., *U.S.-Based Recruitment of Foreign-Educated Nurses: Implications of an Emerging Industry*, 110 AM. J. NURSING 38, 42–43 (2010).
29. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 42.
30. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 42.
31. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 42.
32. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 42.
33. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 42.
34. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 30; Pittman et al., *supra* note 28, at 42.
35. NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 30. See also Pittman et al., *supra* note 28, at 42–43.
36. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29–30; Pittman et al., *supra* note 28, at 43.
37. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 43.

FENs contract with the staffing agencies and are then leased out to health care organizations.³⁸ The FENs are paid an hourly wage between \$25 and \$35, but the staffing agencies ultimately profit an estimated amount between \$50,000 and \$55,000 per FEN.³⁹ Because of its high profit margin, the staffing model is quickly becoming the preferred mode for agencies that recruit FENs to the United States.⁴⁰

Regardless of the business model used to recruit them, each FEN must navigate a rigorous certification process to work in the United States.⁴¹ FENs first must have graduated from a comparable nursing program in their country of origin.⁴² FENs must then successfully complete a nursing exam and an English proficiency exam.⁴³ FENs are required to fill out a self-disclosure indicating nursing licensure in their countries of origin and all misdemeanors, felonies, and plea agreements.⁴⁴ Finally, FENs undergo credential and fraud prevention evaluations to ensure their paperwork is accurate and truthful.⁴⁵ These uniform licensure requirements are used “in order to assure that all nurses, whether educated domestically or abroad, are safe and qualified to practice.”⁴⁶

B. Current Protections Afforded FENs Through Legislation and Case Law

1. Labor Trafficking Protections under the Trafficking Victims Protection Act of 2000 (TVPA)

In 2000, the United States Congress passed the first piece of legislation that directly addressed protections for victims of human trafficking.⁴⁷ The TVPA included not only crimes of sex trafficking

38. See generally NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29. See also Pittman et al., *supra* note 28, at 43.

39. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 29; Pittman et al., *supra* note 28, at 43.

40. See NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 30; Pittman et al., *supra* note 28, at 43.

41. See generally NAT'L COUNS. OF STATE BDS. OF NURSING, INC., *supra* note 28, at 13.

42. See *id.* at 3.

43. See *id.* at 8, 10.

44. See *id.* at 9, 13.

45. See *id.* at 17.

46. *Id.* at 1.

47. Rebecca Jun, *On This Day in History: The Trafficking Victims Protection Act Passed in Congress*, HUM. TRAFFICKING INST.: TRAFFICKING MATTERS (Oct. 28, 2019), <https://www.traffickingmatters.com/on-this-day-in-history-the-trafficking-victims-protection-act-passed-in-congress/> [<https://perma.cc/RDG3-RHEV>]. See also Trafficking Victims Protection Act (TVPA) of 2000, 22 U.S.C. §§ 7101–10 (making human trafficking a federal crime carrying severe penalties).

but labor trafficking, as well.⁴⁸ The purposes of the TVPA were to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”⁴⁹ Prior to 2000, “human trafficking was not treated as a distinct form of crime,”⁵⁰ but after a global effort to directly address the international crisis of human trafficking, Congress enacted the TVPA.⁵¹

Several reauthorizations broadened the TVPA’s scope since its inception more than two decades ago.⁵² In 2003, Congress “[e]stablished a federal and civil authority for victims to sue traffickers, labeled human trafficking as a crime under the Racketeering Influenced and Corrupt Organizations (RICO) statute, and protected victims and their families from deportation.”⁵³ In 2005, Congress “expanded efforts to combat trafficking internationally including a pilot program abroad, and strengthened regulation over government contracts.”⁵⁴ The additional protections initiated in 2008, “[r]equired the U.S. Government to provide information about workers’ rights for those applying for work and education visas, installed new systems to gather human trafficking data, [and] expanded protections from the T visa”⁵⁵ Other provisions passed in 2013 centered on eliminating child exploitation and increasing communication between local and state law enforcement to hold traffickers accountable in courts of law.⁵⁶ The most recent reauthorization of the TVPA increased funds for services provided to victims of human trafficking, raised standards of training for front-

48. See 22 U.S.C. § 7101(b)(3).

49. *Id.* § 7101(a).

50. Jun, *supra* note 47.

51. *Id.*

52. *Id.*; see also Trafficking Victims Reauthorization Act (TVRA), 22 U.S.C. §§ 7101–14 (codifying protections for trafficking victims).

53. Jun, *supra* note 47; see Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. § 7104(c); 18 U.S.C. §§ 1591, 1595(a)–(b), 1961(1)(A); 8 U.S.C. §§ 1101(a)(15)(T), 1184(o)(4)–(6).

54. Jun, *supra* note 47; Trafficking Victims Protection Reauthorization Act of 2005, 22 U.S.C. §§ 7104(h), 7105 (Establishment of Pilot Program for Residential Rehabilitative Facilities for Victims of Trafficking).

55. Jun, *supra* note 47. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7109a(b)(2); 8 U.S.C. §§ 1101(a)(15)(T), 1184(o)(7)(B)–(C), 1184(p)(6), 1255(l), 1255(m), 1375b.

56. Jun, *supra* note 47. Trafficking Victims Protection Reauthorization Act of 2013, 22 U.S.C. §§ 7101 (Promoting Effective State Enforcement), 7103(d)(7)(P)–(R), 7103a(d), 7104(j), 7112(a)(3).

line workers in industries where trafficking is more pervasive, and created requirements for victim-centered protocols for the U.S. Department of Homeland Security and the U.S. Department of Justice.⁵⁷

2. Labor Trafficking and Contract Breach Fee Protections under *Paguirigan v. Prompt Nursing Employment Agency LLC*

In 2017, a Filipino FEN filed a landmark action in the U.S. District Court in the Eastern District of New York against several recruiting agencies and employers for (1) breach of contract and (2) violations of the TVPA.⁵⁸ In 2019, Judge Nina Gershon granted summary judgment for the plaintiffs, finding certain defendants in violation of the TVPA and liable for breach of contract.⁵⁹

Plaintiff Rose Ann Paguirigan brought the suit “on behalf of herself and those similarly situated for violations of the Trafficking Victims Protection Act (‘TVPA’), 18 U.S.C. §§ 1589 *et seq.*,”⁶⁰ claiming that defendant agencies and employers used coercion to induce forced labor and threats of financial harm through \$25,000 in contract breach fees and \$250,000 in tort fees.⁶¹ Paguirigan also brought suit for breach of contract for defendants’ failure to pay the prevailing wage outlined in her contract.⁶²

In the detailed opinion granting summary judgment to Paguirigan and all class members, Judge Gershon (1) granted summary judgment on the breach of contract claims stating that the defendants failed to pay the prevailing wage set out in the employment contracts,⁶³ (2) found the \$25,000 contract breach fees claimed by defendant as liquidated damages to be an unenforceable penalty because the defendant failed to show actual damages,⁶⁴ and (3) determined that certain defendants violated multiple provisions of the TVPA because they knowingly coerced plaintiffs to work with the threat of contract

57. Jun, *supra* note 47. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, 22 U.S.C. §§ 7104(k), 7104e(a)–(b), 7105(b)(2)(A), 7110(b)(1).

58. *See Paguirigan v. Prompt Nursing Emp. Agency*, 286 F. Supp. 3d 430, 434 (E.D.N.Y. 2017).

59. *See Paguirigan v. Prompt Nursing Emp. Agency*, No. 17-cv-1302, 2019 WL 4647648, at *21 (E.D.N.Y. Sept. 24, 2019).

60. *Paguirigan*, 286 F. Supp. 3d at 434.

61. *Id.* at 435–36, 438–39.

62. *Id.* at 440.

63. *See Paguirigan*, 2019 WL 4647648, at *4–7.

64. *See id.* at *7–12.

breach fees, threatened legal action causing serious harm to plaintiffs, and conspired to violate provisions of the TVPA.⁶⁵

In a later opinion, Judge Gershon awarded plaintiffs \$1,559,099.79 in compensatory damages,⁶⁶ though she clarified that “[c]lass members may recover compensatory damages for breach of contract or violations of the TVPA, but not both.”⁶⁷ Plaintiffs also sought punitive damages in the amount of \$1,559,099.79.⁶⁸ However, Judge Gershon refused to grant punitive damages on summary judgment because the defendants were entitled to a jury trial.⁶⁹

III. LEGAL ANALYSIS

A. *Why We Need FENs in the United States*

Due to the COVID-19 pandemic,⁷⁰ the aging American population,⁷¹ and the ongoing shortage of nurses in the United States,⁷² FENs are needed now more than ever. Having FENs as part of the American workforce also “respects the autonomy of nurses, increases cultural diversity, and leads to improved patient satisfaction and health outcomes,”⁷³ as well as helps meet regulatory requirements for nurse staffing across the states.⁷⁴

1. COVID-19

The onset of COVID-19 increased the need for FENs in the United States.⁷⁵ During the height of the pandemic, “immigrant nurses [played] a critical role during the COVID-19 pandemic in hospitals

65. *See id.* at *15–20.

66. *Paguirigan v. Prompt Nursing Emp. Agency*, No. 17-cv-1302, 2021 WL 2206738, at *7 (E.D.N.Y. June 1, 2021).

67. *Id.*

68. *Id.*

69. *Id.*

70. *See Stokes & Iskander, supra* note 11, at 430; Jude Laoagan Tayaben & Ahtisham Younas, *Call to Action for Advocacy of Immigrant Nurses During COVID-19 Pandemic*, 76 J. ADV. NURSING 2220, 2220 (2020); Alessandro Stievano et al., Editorial, *Ethical Challenges and Nursing Recruitment During COVID-19*, 28 NURSING ETHICS 6, 6 (2021).

71. *See Stokes & Iskander, supra* note 11, at 429.

72. Franklin Shaffer & Mukul Bakhshi, *Advocating to Protect Our Nurses: Addressing Unethical Recruitment of Foreign-Educated Nurses*, 42 NURSING ADMIN. Q. 107, 109 (2018).

73. *Stokes & Iskander, supra* note 11, at 429.

74. *Id.* at 430.

75. *See Tayaben & Younas, supra* note 70, at 1.

and home care settings and mitigate[ed] the global shortage of nurses in countries with a higher burden of COVID-19,”⁷⁶ including the United States.⁷⁷ COVID-19 has had harmful effects across the globe,⁷⁸ and advanced countries, like the United States, “will . . . continue relying, in significant measure, on international inflow of nurses as they did pre-COVID-19.”⁷⁹ Currently, “U.S. hospitals are struggling with a shortage of nurses that worsened as pandemic burnout led many to retire or leave their jobs.”⁸⁰ An August 2021 study showed a shortage of 40,000 nurses in the state of California alone.⁸¹ Since the onset of COVID-19, “the demand for international nurses has risen between 300 percent and 400 percent.”⁸² This could be in part because the “surge in the omicron variant in the United States . . . made the strained staffing situation even more apparent in hospitals as health care workers, like so many others, [were] sickened by the highly contagious virus and sidelined from work at a time when more patients [were] coming in.”⁸³ Overall, “immigrant nurses . . . are an essential part of the workforce and play a crucial role in easing the work burden of the healthcare force in high-income countries.”⁸⁴

2. Aging Population

The inevitability of a global aging population also increases the need for FENs.⁸⁵ In the United States specifically, “[i]t is estimated that there will be 73 percent more individuals . . . over the age of 65 by 2029, which will increase the need for healthcare professionals providing health services.”⁸⁶ Not only is the general American population aging, but the shortage of qualified nurses has itself been “exacerbated by a wave of nurses who are aging out of the profession.”⁸⁷ FENs can fill those gaps by both replacing retiring nurses and taking care of the quickly growing elderly population.

76. *See id.*

77. *See Stokes & Iskander, supra* note 11, at 430.

78. *See id.*

79. Stievano et al., *supra* note 70, at 6.

80. Amy Taxin, *U.S. Hospitals Seek Foreign Nurses Amid Pandemic Strain*, PBS (Feb. 3, 2022), <https://www.pbs.org/newshour/health/u-s-hospitals-seek-foreign-nurses-amid-pandemic-strain> [<https://perma.cc/VA2D-LWUY>].

81. *Id.*

82. *Id.*

83. *Id.*

84. Tayaben & Younas, *supra* note 70, at 2.

85. *See Stokes & Iskander, supra* note 11, at 429.

86. *Id.* at 430.

87. *Id.*

Therefore, “[f]oreign recruitment is considered an immediate strategy to . . . satisfy the needs of an aging population.”⁸⁸

3. Ongoing Shortage of Nurses

Even before the existence of COVID-19 and the increase in a global aging population, health organizations have historically depended on FENs to supplement the chronic shortage of nurses across the United States.⁸⁹ Currently, the United States is ill-equipped to properly educate the number of nurses needed to fully staff healthcare facilities across the nation.⁹⁰ However, even if the United States were to expand its educational access to try and meet the demands of the healthcare profession, it is doubtful that the expanse would cover the growing needs of the nursing profession.⁹¹ In fact, “[a]ggressive national and global campaigns have addressed the nursing shortage, but it is projected that by 2025, the United States alone will require half a million more nurses, and by 2030, there will be a shortage of 7.6 million more nurses globally to supply the healthcare demand.”⁹² Therefore, “[g]iven the global nursing shortage and increase in healthcare demands, [FEN] migration is expected to be inevitable”⁹³

4. Other Benefits of FENs in the United States

Recruiting FENs provides other benefits, as well. Without the migration of FENs to the United States, there would be severe staffing burdens,⁹⁴ which could lead to lower patient satisfaction and less favorable health outcomes.⁹⁵ The addition of FENs in the

88. *Id.*

89. *See id.* (“This global and chronic shortage has led to active recruitment of nurses from low- and middle-income countries to fill the shortage in higher income countries[.]”).

90. *See id.* at 429 (“[O]ver 80,000 qualified applicants to nursing programmes were turned away in 2019 due to an insufficient number of faculty, clinical sites, and classroom space[.]”).

91. *See id.*

92. *See id.* at 430.

93. *See id.*

94. *See id.* at 431.

95. *See id.* at 429. *But see* Hayley D. Germack et al., *U.S. Hospital Employment of Foreign-Educated Nurses and Patient Experience: A Cross-Sectional Study*, 8 J. NURSING REGUL. 26, 26–35 (2017) (finding that hospitals employing high number of FENs directly correlated with more negative patient-reported care experience).

workforce “promotes cultural diversity”⁹⁶ and “provid[es] culturally sensitive care.”⁹⁷ It can also be argued that recruiting FENs

can be immensely valuable to all stakeholders. The individual FEN benefits by practicing his or her profession at a higher wage. The employer and the patient benefit by having sufficient, well-trained staff. The sending country’s economy may benefit from remittances the FEN sends to family members back home. A staffing agency can make a profit and support the transition of other nurses to the United States.⁹⁸

Lastly, “[f]oreign recruitment is considered an immediate strategy to meet the regulatory requirements for patient staffing” both nationally and within individual states.⁹⁹ Sixteen states “currently address nurse staffing in hospitals through either law or regulations.”¹⁰⁰ Existing federal regulations only apply to Medicaid-certified hospitals,¹⁰¹ but if pending federal legislation passes,¹⁰² the need for nurses will only increase to meet more stringent nurse staffing requirements.

Because of the numerous reasons FENs are necessary to the success of the healthcare profession in the United States,¹⁰³ more legislative protections are needed to care for the FENs that care for so many Americans.

96. Stokes & Iskander, *supra* note 11, at 433.

97. Tayaben & Younas, *supra* note 70, at 2220.

98. Shaffer & Bakhshi, *supra* note 72, at 109.

99. Stokes & Iskander, *supra* note 11, at 430. *See also* Am. Nurses Ass’n, *Nurse Staffing: Nurse Staffing Advocacy*, NURSING WORLD, <https://www.nursingworld.org/practice-policy/nurse-staffing/nurse-staffing-advocacy/> [<https://perma.cc/9TV5-7624>] (last visited Apr. 27, 2023).

100. Am. Nurses Ass’n, *supra* note 99 (State staffing laws tend to fall into one of three general approaches which include (1) a requirement for hospitals to have nurse driven “staffing committees,” (2) legislators to “mandate[] [specific] nurse to patient ratios, . . . in legislation or regulation,” or (3) requiring facilities to “disclose[] . . . staffing levels, to the public and/or [to a] regulatory bod[y].”).

101. *See id.*; 42 C.F.R. § 482.23(b) (2011) (requiring Medicare-certified hospitals to “have adequate numbers of licensed registered nurses, licensed practical (vocational) nurses, and other personnel to provide nursing care to all patients as needed.”).

102. *See* Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2021, S.1567, 117th Cong. § 3401 (2021) (including a “minimum direct care registered nurse staffing requirement” and a “minimum direct care registered nurse-to-patient ratios” requirement).

103. *See* discussion *supra* Section III.A.

B. Issues Faced by FENs

FENs often face many serious issues that nurses educated in the United States do not.¹⁰⁴ These issues include (1) coercion through exorbitant contract breach fees, which often leads to labor trafficking and lawsuits,¹⁰⁵ (2) lower salaries,¹⁰⁶ (3) discrimination,¹⁰⁷ and (4) poor placements.¹⁰⁸

1. Coercion Through Exorbitant Contract Breach Fees Which Often Lead to Labor Trafficking and Lawsuits

The most severe issues facing FENs in the United States result from unethical recruitment practices by recruitment agencies.¹⁰⁹ “Due to the tremendous benefit destination countries may obtain from migrant nurses, aggressive and often unethical recruitment programmes are common,”¹¹⁰ resulting in an unfair “power imbalance” and “undue influence in hiring.”¹¹¹ Many contracts created by recruitment agencies have unfair terms, such as high contract breach fees, lack of payment until a FEN actually begins work, the freedom of recruitment agencies to relocate FENs without notice, and prohibitions on FENs bringing lawsuits against recruitment agencies.¹¹² If a FEN breaches a contract because of a better job opportunity, recruitment agencies will swiftly sue for contract breach fees and damages.¹¹³ With some contract breach fees reaching as high as \$50,000,¹¹⁴ “[m]ost nurses who send a large

104. See generally Pittman & Pulver, *supra* note 15, at 795; Stokes & Iskander, *supra* note 11, at 429; Tayaben & Younas, *supra* note 70, at 2220; Shaffer & Bakhshi, *supra* note 72, at 113.

105. See Pittman & Pulver, *supra* note 15, at 794.

106. See Shaffer & Bakhshi, *supra* note 72, at 109.

107. See Stokes & Iskander, *supra* note 11, at 433.

108. See Nichols et al., *supra* note 10, at 568; Stokes & Iskander, *supra* note 11, at 435.

109. See Pittman & Pulver, *supra* note 15, at 795; Stokes & Iskander, *supra* note 11, at 435.

110. Stokes & Iskander, *supra* note 11, at 435.

111. *Id.*

112. Pittman & Pulver, *supra* note 15, at 794.

113. *Id.* (discussing two recruitment agencies in particular, MedPro and Health Carousel, who “are responsible for at least 120 lawsuits in the past 5 years in Florida and Ohio, respectively . . .”).

114. PATRICIA PITTMAN ET AL., U.S.-BASED INTERNATIONAL NURSE RECRUITMENT: STRUCTURE AND PRACTICES OF A BURGEONING INDUSTRY 22 (2007). https://www.macfound.org/media/article_pdfs/nursing_code_researchreportyr1.pdf [<https://perma.cc/AJ3N-WDV8>].

portion of their salaries home to families in their country of origin are unable to pay the full penalty in a lump sum.”¹¹⁵

Oftentimes, recruitment agencies need only to threaten a lawsuit to keep FENs in unhealthy work environments.¹¹⁶ These situations commonly rise to the level of coercion,¹¹⁷ which is a clear violation of the TVPA.¹¹⁸ Many FENs who come to work in the United States “lack sufficient knowledge of the U.S. legal system and access to lawyers to represent them”¹¹⁹ Even when FENs are able to access legal assistance, recruitment agencies are often quick to settle to avoid any public admittance of wrongdoing,¹²⁰ giving them freedom to continue with their unethical recruitment practices.¹²¹

2. Lower Salaries

Many FENs are paid lower wages than their domestically educated coworkers.¹²² Despite the fact that “[i]n most cases, employers’ responsibilities under federal visa requirements include equal payment of wages to FENs and similarly employed nurses,”¹²³ the wage disparity between FENs and domestic healthcare workers can be “as much as \$10 less per hour.”¹²⁴ In other cases, “nurses report that, despite promises of an increase, their pay remains the same for a period after obtaining licensure.”¹²⁵ One Filipino nurse in particular

115. *Id.* In some cases, “nurses reported that their employers were unwilling to pro-rate the fee and their employers demanded the nurses pay the penalty in a lump sum at the time of resignation instead of permitting them to pay in installments.” *Id.*

116. *See* PITTMAN ET AL., *supra* note 114, at 26 (listing other threats such as (1) refusing to give nurses a copy of their contracts; (2) charging fees for recruitment services (even though health care facilities pay agencies to place nurses); (3) selling nurses’ contracts to third parties who force nurses to work in new facilities that may be located in other cities; (4) forcing nurses, who believe they have no choice, to sign new contracts; (5) withholding green cards; and (6) threatening nurses with deportation if they break their contracts).

117. Stokes & Iskander, *supra* note 11, at 435 (“Coercion involves threatening to make a person worse off than they would be if they do not conform to your preferences It usually involves an individual agreeing to carry out an action that they do not want to do or prevents an individual from doing something they do want to do.”)

118. *See supra* Section II.B.1.

119. Pittman & Pulver, *supra* note 15, at 2.

120. *See supra* Part I (describing a settlement agreement); Pittman & Pulver, *supra* note 15, at 2.

121. Pittman & Pulver, *supra* note 15, at 2.

122. Stokes & Iskander, *supra* note 11, at 434.

123. *See* PITTMAN ET AL., *supra* note 114, at 23.

124. *Id.*

125. *Id.* at 26.

“had been promoted to supervisor but was still paid less than the U.S. nurses he supervised.”¹²⁶ There is even evidence of wage disparity between FENs from different source countries.¹²⁷ No matter their country of origin, FENs should be paid the same amount as domestically educated nurses for the same skills and services they provide to patients across the United States.

3. Discrimination

FENs also “face racism and discrimination in healthcare settings[] and experience stigmatization and marginalization from other nurses, patients, and their families.”¹²⁸ Once on the job, FENs are more vulnerable to discrimination.¹²⁹ In a 2002 survey, many FENs reported the comforts of job satisfaction and security,¹³⁰ but more recent data shows that “[f]ifty percent of migrant nurses report a negative experience from recruitment and describe unfair work assignments, schedules, and denial of promotion.”¹³¹ In addition, “[n]urses seeking employment in destination countries report false promises and working conditions that do not match those listed in the recruitment contract.”¹³² FENs report “more restricted health benefits than direct-hire employees and, in some cases, no health benefits for the first year of employment.”¹³³ Some staffing agencies also fail to provide vacation or sick leave to their recruited FENs.¹³⁴ Even if “[m]ost of the blatant discrimination practices described by FENs . . . could be considered illegal under U.S. statutory law (i.e., the Fair Labor Standards Act),”¹³⁵ greater legislative protections need to directly address these violations and prevent them from occurring in the first place.

126. *Id.* at 23.

127. *Id.* at 26 (“At least one agency bases pay differentials on nationality and paid Koreans more than Filipinos.”).

128. Tayaben & Younas, *supra* note 70, at 2220.

129. Stokes & Iskander, *supra* note 11, at 433–34.

130. Nichols et al., *supra* note 10, at 584 (discussing the Commission on Graduates of Foreign Nursing Schools (CGFNS) International’s 2002 survey of 789 FENs, where a seventy-six-question phone interview showed eighty-one percent of respondents reported “feeling moderately or extremely satisfied with their jobs as registered nurses, with most reporting that their nursing experience in the United States had met their expectations.”).

131. Stokes & Iskander, *supra* note 11, at 434.

132. *Id.* at 435.

133. PITTMAN ET AL., *supra* note 114, at 23.

134. *Id.*

135. *Id.*

4. Poor Placements

Many FENs who hold master's degrees are still hired for staff nursing positions,¹³⁶ a position for which they are overqualified, or "they are paid minimal wages and often are restricted to work only below or in entry-level jobs."¹³⁷ Some FENs "felt that they received the least desirable assignments because they were foreign-trained and often employed by staffing agencies rather than by the facility itself."¹³⁸ In other cases, "jobs that [FENs] are asked to perform often are not the same jobs they agreed to in contract."¹³⁹

FENs deserve the same protections and workplace privileges as those domestically educated working in the same field with the same level of knowledge and expertise. Because of the vital role FENs hold in the healthcare system across the United States,¹⁴⁰ "equal opportunities should be granted to nurses from source countries."¹⁴¹

C. Limitations on Current Protections

Despite the protections provided for FENs under the TVPA and its reauthorizations,¹⁴² as well as the landmark *Paguirigan* case,¹⁴³ the lack of full legislative protections still leaves many FENs vulnerable to labor trafficking and stringent contract terms, like exorbitant breach fees.¹⁴⁴

Although the three main factors of the TVPA are protection, prosecution, and prevention,¹⁴⁵ its greatest weakness lies in its focus on prevention. Recent civil litigation data shows an all-time high for court cases brought under the TVPA.¹⁴⁶ Though this data may imply

136. Nichols et al., *supra* note 10, at 568.

137. Tayaben & Younas, *supra* note 70, at 2220.

138. PITTMAN ET AL., *supra* note 114, at 23.

139. *Id.* at 26.

140. See discussion *supra* Section III.A.

141. Stokes & Iskander, *supra* note 11, at 434.

142. See *supra* Section II.B.1.

143. See *supra* Section II.B.2.

144. Pittman & Pulver, *supra* note 15, at 794. See also discussion *supra* Section III.B.

145. *Human Trafficking Task Force e-Guide, Human Trafficking Laws*, OFF. OF JUST. PROGRAMS, <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/14-human-trafficking-laws/> [<https://perma.cc/CEB3-J38S>] (last visited Apr. 12, 2023).

146. See REBEKAH R. CAREY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 2020 DATA UPDATE 6–7 (Martina E. Vandenberg & Alexandra Levy Yelderian eds., 2021) https://htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-Data-Update-2020_FINAL.pdf [<https://perma.cc/J4TA-FDHB>] ("[F]ederal civil trafficking cases rose steadily

that more defendants are being held accountable for TVPA violations, recent court cases have put further limitations on who can sue,¹⁴⁷ and who can be sued,¹⁴⁸ under the TVPA. Stronger legislative protections are needed to prevent these violations in the first place, thereby obviating the need for such suits.

Over the past fifteen years, several voluntary codes of ethics have been developed both in the United States and globally to address the unethical recruiting practices of foreign-educated healthcare workers.¹⁴⁹ Though these ethics codes were developed largely because of “the valid contribution of international recruitment,”¹⁵⁰ “[a] 2020 study conducted by [the Commission on Graduates of Foreign Nursing Schools (CGFNS)] and the Alliance for Ethical International Recruitment Practices found that progress is indeed being made in preventing predatory recruitment, but that many process concerns remain, including high contract breach fees and inadequate orientation.”¹⁵¹ On their website, the Alliance for Ethical International Recruitment

provides a list of Certified Ethical Recruiters (CERs) as a resource for employers and foreign-educated health professionals looking to work with reputable recruitment organizations. CERs have established that they are in compliance with the standards set forth in the Code, have agreed to be monitored by the Alliance, and agreed to mediation and remediation processes as necessary.¹⁵²

While this seems good in theory, one of the recruitment agencies listed as a CER is Health Carousel,¹⁵³ which is a recruitment agency that, along with MedPro, is “responsible for at least 120 lawsuits in

between 2003 and 2020, with more than fourteen times as many cases filed in 2019 (88) as in 2004 (6).”).

147. *See generally* N.Y. State Nurses Ass’n v. Albany Med. Ctr., 473 F. Supp. 3d 63, 72 (N.D.N.Y. 2020) (holding that a nurse’s union did not have standing to sue under the TVPA).

148. *See generally* Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd., 790 F. Supp. 2d 1134, 1143 (C.D. Cal. 2011) (finding the TVPA did not extend to government entities).

149. *See generally* Shaffer & Bakhshi, *supra* note 72, at 111–13; Stievano et al., *supra* note 70, at 7; Stokes & Iskander, *supra* note 11, at 430, 432, 436–37.

150. Stievano et al., *supra* note 70, at 7.

151. *Id.*

152. *View Certified Recruiters*, ALL. FOR ETHICAL INT’L RECRUITMENT PRACS., https://www.cgfnsalliance.org/certification_process/view-certified-recruiters/ [<https://perma.cc/U5CN-W6F9>] (last visited Apr. 12, 2023).

153. *Id.*

the past 5 years” in Ohio and Florida, respectively.¹⁵⁴ MedPro is missing from the list of CERs,¹⁵⁵ but if MedPro and Health Carousel are suing FENs for outrageous contract breach fees and not being held accountable, then what difference do these voluntary ethical codes *really* make when it comes to protecting FENs? The answer is obvious: the difference is not enough. More legislative protections are still clearly needed.

IV. CONCLUSION

Without the presence a vast number of FENs, the United States would inevitably suffer from a national healthcare crisis. Greater prevention legislation is needed to eliminate unethical recruitment practices and thus avoid FENs being forced to file civil lawsuits as their primary means of remedial solutions to the myriad issues they face.¹⁵⁶ In the past, advocates for FENs have called for the elimination of breach fees, reasonable contract terms, guaranteed job placement, and an FEN’s ability to sue the agency.¹⁵⁷ If the goal of United States legislation is really about protecting FENs and other foreign-educated healthcare workers,¹⁵⁸ then the contracts signed by FENs should mirror contracts created for domestic healthcare workers. FENs need to have access to the same rights and privileges afforded domestic educated nurses.¹⁵⁹ The number of FENs in the United States is only expected to increase,¹⁶⁰ and “providing unequal opportunities for nurses prevents nurses from attaining the skills learned by nurses educated in destination countries.”¹⁶¹ FENs have cared for Americans for more than fifty years.¹⁶² It is time America starts caring for them.

154. Pittman & Pulver, *supra* note 15, at 794.

155. *See generally View Certified Recruiters*, *supra* note 152.

156. *See* discussion *supra* Sections III.B–C.

157. *See* Pittman & Pulver, *supra* note 15, at 794.

158. *See* discussion *supra* Section II.B.1.

159. PITTMAN ET AL., *supra* note 114, at 23 (“e.g., freedom of association, freedom from discrimination, the right to a safe work environment, equal pay for work of equal value, easy access to grievance procedures”).

160. Stokes & Iskander, *supra* note 11, at 430.

161. *Id.* at 435.

162. *Id.* at 429.