

HUMAN TRAFFICKING  
**RESTITUTION**  
RESOURCE GUIDE

Written by Cassandra Jo Murphy

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## MANDATORY RESTITUTION IN FEDERAL CRIMINAL HUMAN TRAFFICKING CASES

Federal law requires that convicted human traffickers pay restitution to their victims.<sup>1</sup> In practice, however, federal judges ordered only 21.4 percent of these defendants to pay restitution.<sup>2</sup> In an effort to increase compliance with federal law, this resource guide explores the process for seeking and awarding restitution in trafficking cases, details the formulas for accurately calculating restitution awards, debunks myths surrounding restitution, and notes recent case developments in this area of law.

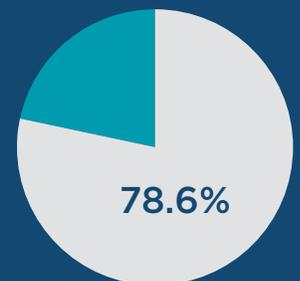
### I. RESTITUTION IS MANDATORY

In October 2000, Congress passed the Victims of Trafficking and Violence Protection Act (TVPA),<sup>3</sup> which requires convicted defendants in trafficking cases to pay restitution to their victims. This provision applies to all acts covered by Chapter 77 of Title 18 of the United States Code,<sup>4</sup> including:

- § 1581- Peonage;
- § 1582- Use of Vessels for Slave Trade;
- § 1583- Enticement into Slavery;
- § 1584- Sale into Involuntary Servitude;
- § 1585- Seizure, Detention, Transportation or Sale of Slaves;
- § 1586- Service on Vessels in Slave Trade;
- § 1587- Possession of Slaves Aboard Vessel;
- § 1588- Transportation of Slaves from United States;
- § 1589- Forced Labor;
- § 1590- Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor;
- § 1591- Sex Trafficking of Children or By Force, Fraud, or Coercion;
- § 1592- Unlawful Conduct with Respect to Documents in Furtherance of Trafficking, Peonage, Slavery, Involuntary Servitude, or Forced Labor; and
- § 1593A- Benefitting Financially from Peonage, Slavery, and Trafficking in Persons.<sup>5</sup>

Despite the TVPA's mandate for judges to order restitution in all trafficking cases, only a fraction of victims ever receive an award of restitution. According to the 2017 Federal Human Trafficking Report, "courts elected not to order mandatory restitution [in] 78.6 percent" of cases.<sup>6</sup>

### MANDATORY RESTITUTION



■ ORDERED TO PAY  
■ NOT ORDERED TO PAY

<sup>1</sup> 18 U.S.C. § 1593.

<sup>2</sup> 2017 Federal Human Trafficking Report, The Human Trafficking Institute, p. 34, <http://www.traffickingmatters.com/wp-content/uploads/2018/04/2017-Federal-Human-Trafficking-Report-WEB-Low-Res.pdf> (2018).

<sup>3</sup> Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2000).

<sup>4</sup> 18 U.S.C. § 1593.

<sup>5</sup> In the event that the defendant is ultimately charged with a different or lesser offense than those included on this list, the prosecution can still seek discretionary restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A, 3664.

<sup>6</sup> 2017 Federal Human Trafficking Report, The Human Trafficking Institute, p. 34, <http://www.traffickingmatters.com/wp-content/uploads/2018/04/2017-Federal-Human-Trafficking-Report-WEB-Low-Res.pdf> (2018).

## A. RESTITUTION IS MANDATORY REGARDLESS OF THE ILLICIT NATURE OF THE SERVICES OFFERED BY THE VICTIM

Defense attorneys frequently advocate for denying restitution to trafficking victims by claiming that “victims of [] trafficking don’t deserve restitution, because the work is illegal.”<sup>7</sup> Surprisingly, courts accept this rationale more frequently when one or more of the victims is a minor.<sup>8</sup>

Focusing on the illicit nature of the services offered conflicts with the language of the TVPA.

Courts have found that “[t]he express terms of 18 U.S.C. § 1593 require that the victims . . . receive restitution, notwithstanding that their earnings came from illegal conduct.”<sup>9</sup> Congress did not qualify or limit restitution based on legality, so courts should act in accordance with Congress’s stated purpose.

## B. RESTITUTION IS MANDATORY FOR INDIVIDUAL VICTIMS

Courts have also denied restitution under the theory that society at large—rather than the individual trafficking survivor—is the victim of human trafficking crimes.<sup>10</sup> According to this theory, awarding restitution to an individual would be inappropriate because society bears the costs as a whole.

Although human trafficking certainly comes at a cost to society, precluding restitution on this basis denies individual victims compensation for the real and enduring harms they suffered. This rationale also ignores the language and

...DENYING RESTITUTION TO VICTIMS BECAUSE THEY DID NOT REQUEST IT CONTRADICTS THE EXPRESS PROCEDURES OUTLINED IN FEDERAL LAW



purpose of § 1593, which aims to provide relief to individual victims. If Congress did not consider individual trafficking survivors to be victims of trafficking crimes, the legislation would not call for restitution to victims on an individual basis. Furthermore, although judges can award restitution to government institutions or other third parties, Congress primarily meant for restitution to benefit individual survivors of trafficking.<sup>11</sup>

## C. RESTITUTION IS MANDATORY EVEN IF VICTIMS DO NOT REQUEST RESTITUTION OR PARTICIPATE IN PROCEEDINGS

Courts have declined restitution awards in human trafficking cases because the victim did not specifically request restitution or participate in determining the appropriate amount.<sup>12</sup> Although victim participation may help the government determine a suitable award, the onus to seek restitution and prove the appropriate amount does not lie with the victim.

The federal procedures for seeking restitution state that “[n]o victim shall be required to participate in any phase of a restitution order.”<sup>13</sup> This exemption applies to both the initial request and efforts to calculate the amount to be requested. Accordingly, denying restitution to victims because they did not request it contradicts the express procedures outlined in federal law.

<sup>7</sup> Stephanie Francis Ward, *Despite mandatory restitution law, courts rarely award trafficking victims lost wages, study finds*, ABA JOURNAL (Sept. 30, 2014), [http://www.abajournal.com/news/article/courts\\_rarely\\_awarded\\_sex\\_trafficking\\_victims\\_compensation\\_study\\_finds](http://www.abajournal.com/news/article/courts_rarely_awarded_sex_trafficking_victims_compensation_study_finds).

<sup>8</sup> Alexandra F. Levy & Martina E. Vandenberg, *Breaking the Law: The Failure to Award Mandatory Criminal Restitution to Victims in Sex Trafficking Cases*, 60 St. Louis U. L.J. 43, 53-54 (2015).

<sup>9</sup> *United States v. Mammedov*, 304 Fed. Appx. 922, 927 (2d Cir. 2008); *see also United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010) (noting that “the Trafficking Act mandates restitution that includes a defendant’s ill-gotten gains”).

<sup>10</sup> Levy, *supra* note 8, at 44.

<sup>11</sup> 18 U.S.C. § 3664(j)(1).

<sup>12</sup> *United States v. McHenry*, 849 F.3d 699, 707 (8th Cir. 2017).

<sup>13</sup> 18 U.S.C. § 3664(g).

## D. RESTITUTION IS MANDATORY EVEN IF THE DEFENDANT IS JUDGMENT PROOF

Finally, courts have failed to award restitution because of the perception that the defendant is “judgment proof,” meaning that they do not have the financial assets to satisfy the amount awarded; however, the court should still order restitution from judgment proof defendants because it is mandatory.<sup>14</sup>

Federal law anticipates judgment proof defendants and gives the court discretion to find creative solutions to a defendant’s inability to pay.<sup>15</sup> For example, the court may order the defendant to pay “nominal periodic payments” rather than lump-sum payments.<sup>16</sup> This approach allows the victim to be made whole regardless of the defendant’s financial situation.

Furthermore, even if a defendant cannot afford restitution when it is ordered, his or her financial situation may improve. In the event that the defendant does earn or inherit financial assets, that money would be subject to the court’s restitution order.<sup>17</sup> Ordering judgment proof defendants to pay restitution enables trafficking victims to recover if the defendant’s financial situation changes.

## II. HOW TO PROPERLY CALCULATE RESTITUTION

Courts must order restitution for the “full amount of the victim’s losses, as determined by the court.”<sup>18</sup> The “full amount” includes the “gross income or value” of the victim’s services—whichever is greater.<sup>19</sup>

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In labor trafficking cases, the court calculates the amount of restitution by determining the hourly value of the victim’s labor, including overtime as determined by the Fair Labor Standards Act (FLSA),<sup>20</sup> multiplied by the number of hours worked.<sup>21</sup> In domestic servitude cases, live-in workers cannot claim overtime wages, but can claim 24 hours of wages per day.<sup>22</sup> In sex trafficking cases, the court calculates the value of the victim’s services by multiplying the monetary value of the illicit act, the number of acts per day, and the number of days worked.<sup>23</sup> In addition to the value of the services provided, a restitution order may also include medical costs incurred by the victim, transportation needs, temporary housing, child care, lost income, attorneys’ fees, and any other costs borne by the victim due to the trafficking crime.<sup>24</sup>

<sup>14</sup> “In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(f)(1)(A).

<sup>15</sup> 18 U.S.C. § 3664(f)(1).

<sup>16</sup> 18 U.S.C. § 3664(f)(3)(B).

<sup>17</sup> 18 U.S.C. § 3664(k).

<sup>18</sup> 18 U.S.C. §§ 1593(a), (b)(1).

<sup>19</sup> 18 U.S.C. § 1593(b)(3).

<sup>20</sup> Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

<sup>21</sup> 18 U.S.C. § 1593(b)(3).

<sup>22</sup> See *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010) (holding that the district court erred in awarding victims overtime as a part of restitution because the victims resided in the defendants’ home and were subject to the domestic servant exemption of the FLSA).

<sup>23</sup> 18 U.S.C. § 1593(b)(3). The fact that the restitution amount does not have to be calculated with “exactitude” is significant in sex trafficking cases because it allows courts to avoid assigning dollar values to sexual acts.

<sup>24</sup> 18 U.S.C. § 1593(b)(3), citing 18 U.S.C. § 2259(b)(3).

In the event of a dispute over the amount of restitution owed to the victim, the government bears the burden of proving the victim’s loss based on a preponderance of the evidence,<sup>25</sup> which need not “be proven with exactitude.”<sup>26</sup> Courts calculating restitution amounts are entitled to rely on any evidence bearing “sufficient indicia of reliability to support its probable accuracy.”<sup>27</sup> Such evidence does not have to be subject to cross examination and can come in various forms, including victim testimony, sworn affidavits, input from a guardian ad-litem, testimony from qualified officials, or through a Declaration of Victim Losses Statement.<sup>28</sup> The basis for the restitution order must be included in the record in the form of a report.<sup>29</sup> Furthermore, defendants may be held jointly and severally liable for the restitution to the victim.<sup>30</sup>

### III. PROCEDURE FOR SEEKING RESTITUTION

The TVPA directs courts awarding restitution in trafficking cases to follow the procedures laid out in 18 U.S.C. § 3664.<sup>31</sup> Under that section, the court must order the probation officer to obtain information regarding restitution and include it in its presentence report. The probation officer can then require the government attorney in the case to provide a list of the amounts subject to restitution. Accordingly, the burden falls on the court to raise the issue of restitution, but the burden of producing the information relevant to the restitution amount falls on the government.

After reviewing the presentence report, the court may request additional documentation on the issue of restitution or require a hearing.<sup>32</sup> The court then decides the proper amount to be awarded to the trafficking victim.

Best practices dictate that absent the court’s sua sponte action the government should raise the issue of restitution to the court through either an oral or written motion.<sup>33</sup> That action would initiate the cycle detailed above by flagging for the court the need to calculate and order restitution in the trafficking case.



<sup>25</sup> 18 U.S.C. § 3664(e).

<sup>26</sup> In re Sealed Case, 702 F.3d 59, 66 (D.C. Cir. 2012).

<sup>27</sup> United States v. Batson, 818 F.3d 651, 665 (11th Cir. 2016).

<sup>28</sup> *Id.*

<sup>29</sup> 18 U.S.C. § 3664(a).

<sup>30</sup> 18 U.S.C. § 3664(h).

<sup>31</sup> 18 U.S.C. § 1593(b)(2).

<sup>32</sup> 18 U.S.C. § 3664(d)(4).

<sup>33</sup> United States Federal Courts’ Continuing Failure to Order Mandatory Criminal Restitution for Human Trafficking Victims, The Human Trafficking Legal Center, p. 5, <http://www.htlegalcenter.org/wp-content/uploads/2018-Mandatory-Restitution-Report.pdf> (2018).

## IV. RECENT LEGAL DEVELOPMENTS

Recently, the Federal Courts of Appeals have reinforced the importance of restitution and clarified some of the issues within this area of law.

- *United States v. Pleitez*- The Fifth Circuit held that a hearing to determine the proper amount of restitution constitutes a “critical stage of a criminal proceeding,” such that a defendant is entitled to counsel.<sup>34</sup>
- *United States v. Culp*- The Sixth Circuit stated that a defendant’s plea agreement waiver of the right to appeal a sentence also applies to the right to appeal a restitution order.<sup>35</sup>
- *United States v. Charles*- The Eighth Circuit asserted that a defendant can be ordered to pay restitution for damages caused by online-only activity or resulting from attempted victimization.<sup>36</sup>
- *United States v. Nash*- The Ninth Circuit held that the restitution award need not be proportional to the defendant’s conduct, as the amount is based on the victim’s losses not the defendant’s actions.<sup>37</sup>
- *United States v. Batson*- The Eleventh Circuit explained that the court can order defendants to pay restitution to their victims even when the trafficking scheme operated entirely in a foreign country.<sup>38</sup>
- *United States v. Robinson*- The Eleventh Circuit clarified that even minors who state they are “voluntarily” engaging in commercial sex are victims, as defined by the statute, for purposes of awarding restitution.<sup>39</sup>

## V. CALL TO ACTION

On paper, restitution is mandatory in all human trafficking cases; however, in practice, victims rarely receive a dollar of the amount they are entitled to by law. In order to make trafficking victims whole and provide them with the necessary resources to rebuild their lives, courts must award the restitution mandated by the TVPA.



<sup>34</sup> 876 F.3d 150 (2017).

<sup>35</sup> 608 Fed.Appx. 390 (2015).

<sup>36</sup> 895 F.3d 560 (2018).

<sup>37</sup> 558 Fed.Appx. 741 (2014).

<sup>38</sup> 818 F.3d 651 (2016).

<sup>39</sup> 508 Fed.Appx. 867 (2013).

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