CLIENT ALERTS & INSIGHTS

Forced Labor - Compliance and Best Practices Across Emerging Global Requirements

NOVEMBER 4, 2024

Authors: Jonathan R. Todd, Brian Cullen, Megan K. MacCallum

Combatting forced labor is growing from aspiration of company boards to a mission-critical focus impacting day-to-day operations. Companies with global footprints are not alone in witnessing acute compliance and reputational impacts. Any domestic U.S. company that sources product from abroad can face detention of imported goods followed by a lengthy process of defending the absence of forced labor. The U.S. is far from alone in this emerging trend of Western governments increasing requirements, and consequences, around the procurement and sale of goods. This article surveys the current state of law in a few key jurisdictions, the practical implications, and best practices for taking risk-appropriate steps to manage compliance.

US UYGHUR FORCED LABOR PREVENTION ACT

The United States Uyghur Forced Labor Prevention Act ("UFLPA") enacted in 2021 applies a rebuttable presumption that all imports to the US from the Xinjiang Uyghur Autonomous Region of China (the "XUAR") were produced with forced labor.

Application - The UFLPA applies to all items imported to the US from the XUAR or with inputs sourced or produced from the XUAR. It superseded the previous United States Withhold Release Order ("WRO") regime which applied only to specific items (for example, cotton and tomatoes).

Practical Impact - Imports from the XUAR or suspected to be from the XUAR are denied customs entry by U.S. Customs and Border Protection agency ("CBP") and its Forced Labor Enforcement Task Force ("FLETF") unless the importer can rebut the presumption or demonstrate that an exception applies. Detained goods must be reexported or will be forfeit unless the importer can rebut the presumption. At a high level, rebuttal requires sourcing due diligence information, supply chain tracing information, supply chain management detail, and specific evidence that goods were not mined, manufactured, or produced in the XUAR or by the use of forced labor. CBP has discretion to determine the sufficiency of such information.

Practical Steps for Compliance - Companies that import products from China or that include China inputs are at risk of UFLPA detention and the presumption that forced labor exists in their supply chain. Preparing to avoid detention is an exercise specific to each company's supply chain, but a few preventative steps include:

Party Screening and Diligence. Strong and confident relationships with suppliers in China can be helpful for navigating UFLPA detentions. Supplier screening against the UFLPA entity list is an essential step because it contains a non-exhaustive roster known exporters of products made with forced labor.

Certificates of Origin. Certain aspects of the supplier relationship can be established under purchase agreements to help align expectations in the event of disruption and manage risk. Requiring certificates of origin that specify where production occurred, the source of all inputs, and the absence of forced labor can be a highly valuable procedural tool and expectation. Maintaining current certificates provides the first essential piece of evidence when challenged to prove the character of imports to the U.S.

Supply Chain Mapping. Supply chain maps showing origin, manufacture, and production of the goods as well as transportation along the chain helps to provide evidence of all inputs and chain-of-custody in response to CBP questions.

On-Site Audits. Companies can also engage third-parties in China or send employees on-site to audit manufacturing and production processes on the ground, take photos of compliant operations with for-hire employees, and document findings to support the absence of forced labor if challenged.

UK MODERN SLAVERY ACT

The UK Modern Slavery Act requires UK companies (and those that have online presences and suppliers in the UK) generating turnover of at least £36 million to publish a statement of compliance to outline efforts to prevent and stop slavery in their supply chains.

Application - The UK Modern Slavery Act 2015 applies to all businesses that offer goods or services within the UK. Enforcement is interpreted as applying to companies with: physical presence within the UK; employees operating within the UK; online or e-commerce presence within the UK or that specifically targets the UK market; or significant long-term suppliers and clients that "operate" within the UK market. The substantive compliance obligation is to publish a modern slavery statement.

Regulatory Impact - The modern slavery statement requires companies to outline efforts to combat modern slavery in owned operations as well as its within the supply chain. A company's modern slavery statement must be reviewed and approved by the company's board of directors. A company must then publish its approved modern slavery statement on the company's website with a clear and conspicuous link located on the company's website homepage. The company is required to review, obtain approval, and then, if necessary, update the website publication of its modern slavery statement on an annual basis no later than six months after the end of the company's annual financial year.

Practical Steps for Compliance - Similar to the UFLPA, the set of tools for compliance with the UK Modern Slavery Act includes supply chain mapping, certificates of origin, on-site audits, and screening practices. Other pragmatic steps specific to the Modern Slavery Act include:

Annual Modern Slavery Statement Review Process. Companies that will approach or meet the £36 million turnover threshold must develop processes to manage the requisite modern slavery statement and properly review it each year. Practical steps include delegating a point of contact to be responsible for managing the statement, and compliance violations.

Compliance Program Development. The UK Modern Slavery Act requires active and ongoing compliance including steps to combat slavery in the supply chain. Regulated companies may establish internal processes to manage compliance and address forced labor issues across the supply and production base. This program can include "red flag" training for employees to identify signs of slavery in a

supplier or vendor's operations, an internal reporting mechanism for suspected slavery issues, contract terms in all international dealings to require compliance, indemnity for violation of the same, and other tailored steps that are unique to the company's operation.

EU FORTHCOMING FORCED LABOR REGULATION

The EU Forced Labor Regulation is set to be approved and implemented by 2027. It will prohibit import to the EU of any items made with forced labor and will track those items across the territory.

Application - The E.U. Parliament voted in April of 2024 to adopt the FLR which will be implemented by member countries over the next three (3) years if the EU Council votes to approve it this year. The FLR is expected to be implemented by all countries in various phases through 2027.

Regulatory Impact - The FLR will prohibit the import into the EU of any item at any stage in the supply chain if it was made with forced labor. The FLR will also establish and publish a database of products deemed by the enforcement commission to be made with forced labor. Products listed in the database will be prohibited from import to the EU. As currently drafted, The FLR does not require any particular kind of protective diligence or affirmative "approval" process for products to enter the marketplace. Instead, it will identify and prohibit violative products.

Practical Steps for Compliance - In all cases, supply chain mapping, certificates of origin, on-site audits, and screening practices described for compliance with other forced labor compliance programs will be valuable for FLR compliance. The challenge in preparing for FLR compliance is that specific requirements of the FLR remain to be seen. The FLR has not yet approved and implemented across the member states. Accordingly, establishing basic compliance practices as required by other EU laws, and member state laws, or otherwise required by US and UK operations is a strong initial protective step alongside tracking of the FLR.

EU STATE-SPECIFIC FORCED LABOR LAWS

EU member states have variously implemented other forced labor compliance obligations requiring awareness depending upon a company's footprint and supply chain. Examples of key legislative instruments include, without limitation, the French Duty of Vigilance Law, German Supply Chain Due Diligence Act, and the Netherlands Child Labor Due Diligence Law. Companies must adopt proactive and legally sound approaches to ensure compliance with these overlapping, yet sometimes distinct, legal requirements.

Practical Steps for Compliance - Best practice for all other forced labor compliance obligations have applicability here in addition to certain state-specific considerations, including:

Policy Development and Internal Controls. Each of the exemplar state-specific laws require a company to establish robust policies that prohibit forced labor, aligning with the specific requirements of relevant national laws. Those policies must be operationalized through internal controls, corporate training of associates, and contractual obligations with a company. The implementation of policies must be demonstrable, as companies are legally required to show evidence of compliance efforts, particularly under the French, German, and Dutch law's requirements regarding child labor.

Audit and Reporting Requirements. Each of the state-specific laws have unique reporting requirements. The French and German laws require audits of a company's supply chains on a recurring basis to

assess compliance with certain human rights standards. Dutch law imposes reporting obligations that require companies to publicize the company's efforts to identify and eliminate potential child labor issues.

Continuous Monitoring and Internal Grievance Reporting. Compliance is always a process and these state-specific laws are no different in their requirement for continuous monitoring. For example, the German law requires specific grievance mechanisms to be in place where company workers can report potential violations or other concerns with the company or vendors.

EU FORTHCOMING CORPORATE SOCIAL SUSTAINABILITY DIRECTIVE

The EU's Corporate Social Sustainability Directive (the "CSSD") will require companies that meet turnover thresholds to develop a plan to manage the ethics and impacts of their supply chains from a human rights, forced labor, and climate change perspective.

Application - The EU passed the CSDD in July of 2024 and EU member states must adopt and implement the national directive into law by 2026. Compliance dates depend on company revenue. The Directive will initially include the largest regulated EU companies with more than 5,000 employees and €1 500 million worldwide turnover, and non-EU companies with more than €1 500 million generated in the EU. In 2028, the Directive will apply to EU companies with more than 3,000 employees and €900 million turnover generated in the EU. By 2029, the Directive will apply to all other companies in the EU with more than 1,000 employees and €450 million net turnover worldwide, and to all other non-EU companies with €450 million net turnover in the EU.

Regulatory Impact - Regulated companies have many obligations under the CSDD but also have discretion to determine how to meet those obligations. The highest impact obligations include adopting and implementing a transition plan for climate change mitigation. Companies must also identify the human rights and environmental impacts along their supply chain including as caused by their subsidiary and affiliate entities and the suppliers and vendors with whom they deal and develop a plan to reduce or remedy any negative impacts. In doing so, companies must also engage with stakeholders to assess their impacts and allow stakeholders to participate in due diligence. Companies must integrate due diligence into corporate policies and risk management systems into their overall plan.

Practical Steps for Compliance - Additional pragmatic steps for compliance with the CSDD in addition to those described here for other similar programs include ensuring that business teams have the ability to review and manage compliance with required metrics. This may require the utilization of new technology or third-party consultants with expertise to in tracking the environmental and social impacts impact generally. Employees can also be trained by third-parties to track and manage tracking against those metrics.

PLANNING TO MEET THE CHALLENGE

The trendline for global efforts combatting forced labor is clear. Western countries are increasingly viewing the need to combat forced labor and broader human rights concerns as moral imperative that companies must strive to accomplish. This is no longer discretionary for a company and its board - it is developing with real-world impacts to operations and compliance. The challenge for supply chain professionals is to develop scalable programs to maintain compliance, limit interruption and reputational harm, and achieve the objectives for those jurisdictions in which we operate. Fortunately, the themes for compliance in one jurisdiction have broad applicability in other territories. We can all do better in our sourcing, our efforts to protect against supply chain challenges, and the integrity of the goods that we sell regardless of where they may be produced.

Jonathan Todd is Vice Chair of Benesch's Transportation & Logistics Practice Group. He can be reached at 216-363-4658 or jtodd@beneschlaw.com.

Brian Cullen is Of Counsel in the Practice Group. He can be reached at 312-488-3297 or bcullen@beneschlaw.com.

Megan K. MacCallum is an Associate in the Practice Group. She can be reached at 216-363-4185 or mmaccallum@beneschlaw.com.