

# UFLPA Forced Labor Detentions by CBP - Why They Happen and What To Do

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Source: *Array*

We are seeing a steady increase in client imports being detained at port by U.S. Customs and Border Protection (CBP) on grounds of alleged forced labor in the supply chain.

The issue of forced labor is appearing in a wide range of industries beyond consumer retail (particularly textiles and fashion), where it has been a challenge for some time. Today, enforcement of the Uyghur Forced Labor Prevention Act (UFLPA) is challenging global product sourcing and domestic inventories in new ways while also offering some new tools. This article summarizes the forced labor issue, the current state of law, and strategies for preventing detention as well as potentially rebutting presumptions of forced labor if goods are stopped.

## Forced Labor in China-Sourced Finished Goods and Raw Materials

The UFLPA targets forced labor of the Uyghur peoples in the Xinjiang Uyghur Autonomous Region of China (the Xinjiang Region). The Uyghur are a Muslim ethnic minority group who have their own culture and language and religious practices distinct from the Han majority group in China. The Xinjiang Region has changed control many times in its history. It was most recently occupied by China in 1949 and remains subject to Chinese control today. Recently, China implemented policies of mass detention, forced and coerced labor, political indoctrination, and violence against the Uyghur people and other ethnic minority groups in the Xinjiang Region.

The Xinjiang Region has abundant resources. It produces the vast majority of China's cotton at 80% of the total national production. It also contains the largest natural gas and coal reserves in China. Millions of Uyghur people and other minority group people have been detained in camp facilities and forced to participate in forced labor resulting in significant production of goods exported to the benefit of the Chinese economy. These goods include gloves, hair products, polysilicon, textiles and cotton in particular, thread and yarn, tomato products, and fish.

Many of the goods produced with forced labor are believed to enter U.S. commerce. In response, the U.S. has implemented robust trade policies in an effort to combat the abuses taking place in the Xinjiang Region and continues to assess its approach to the issue.

## Historic Withhold Release Orders (WROs)

CBP is at the front lines of the U.S. fight against forced labor. Prior to the UFLPA, one of the mechanisms used to prevent the entry of goods produced by forced labor was to issue Withhold Release Orders (WROs) under Section 307 of the Tariff Act of 1930. WROs allow CBP detain product

prior to release into the U.S. A series of WROs have been related to goods produced in China. In 2021, CBP implemented WROs against certain products from the Uyghur Region including for cotton, tomatoes, and downstream products generally, and for cotton and processed cotton, apparel, garments, hair products, and more from entities exploiting or forcing the labor of the Uyghur people.

### **Current UFLPA Regime and FLETF Guidance to Importers**

The following year, in 2022, CBP began implementation and enforcement of the UFLPA, which superseded the product and entity WROs. A key feature of the UFLPA is establishment of a broad rebuttable presumption that the import of any goods manufactured in whole or in part in the Xinjiang Region, or produced by certain listed entities, are produced with forced labor and are unlawful for import pursuant to the Tariff Act. The rebuttable presumption means that entry is prohibited unless the Importer of Record can demonstrate the absence of forced labor in the supply chain for the detained good.

The UFLPA also established the Forced Labor Enforcement Task Force (FLETF). The FLETF is composed of seven member agencies: the Office of the U.S. Trade Representative, and the U.S. Departments of Homeland Security (which is the Chair), Labor, State, the Treasury, Justice, and Commerce. FLETF is responsible to enforce the prohibition of Chinese imports manufactured with forced labor. At a high level, its 2022 Congressional Report includes a comprehensive assessment of the risk of prohibited forced labor imported goods from China, evaluates and describes forced labor schemes, recommends efforts and initiatives and tools for effective supply chain diligence and source tracing, offers resources, offers guidance to importers, and establishes a comprehensive collaborative plan to prevent prohibited imports with relevant private and nonprofit stakeholders. Just last year in 2023, FLETF updated its strategy in a Congressional Report, including advancements in an UFLPA Entity List, identification of new resources, and updates on cross-sector efforts to prevent and prohibit the same.

Most recently, on April 5, 2024, the Department of Homeland Security (DHS) signaled strengthened efforts to enforce compliance with the UFLPA. DHS announced that CBP and its sister agency Homeland Security Investigations (HSI) will “crack down” on forced labor in small-package textile shipments subject to CBP’s Section 321 program for de minimis low-value imports. DHS also announced that CBP and HSI would conduct special operations to ensure cargo compliance generally, including physical inspections as well as isotopic and composition testing to determine country of origin. Finally, DHS plans to increase its performance of comprehensive audits and textile production verification team visits to high-risk foreign facilities, and will double the number of total foreign verification visits from last year. While it takes these steps, DHS plans to leverage industry partnerships to improve legitimate trade and continue building awareness of regulations with importers and suppliers.

A significant development is that these actions are now targeting regions outside the Xinjiang Region, or greater China, and a broad range of goods. For example, CBP has publicly confirmed visits to facilities in Mexico and Honduras. The Department of Labor (DOL) has released similar informal guidance on forced labor against minorities around the world. We have anecdotally witnessed evidence of the new enforcement against other regions and different products across our importer clients experiencing detention.

## What To Do When It Happens to You

The best defense against CBP detentions is to assess the risk of forced labor in your supplier selection and procurement process. All U.S. companies with significant purchasing, particularly from China, must now develop comprehensive approaches to the forced labor issue in upstream supply. Basic strategies involve implementing internal policies against forced labor and flowing those into purchasing agreements, requiring strong certificates of origin, and as best as possible examining the circumstances of upstream sourcing as well as finished goods production by your suppliers. The goal is to place your company in a position so that if there is an issue, you have a quality file available with documentary evidence showing that the supplier, their raw materials, the region, and manner of production in no way indicate the existence of forced labor.

The clearest and most tangible tool for forced labor compliance is checking an Entity List, similar to how companies approach sanctions compliance. FLETF released a UFLPA Entity List that may be checked during the procurement or supplier onboarding process. The list is available on the DHS UFLPA website and changes are published in the Federal Register. The UFLPA Entity List consolidates the four subcategories for names associated with forced labor practices. The first list names Xinjiang entities using forced labor to fully or partially mine, produce, or manufacture goods. The second directory provides entities collaborating with the Xinjiang government to enlist, traffic, conceal, or obtain forced labor (e.g., from members of persecuted groups such as Uyghurs, Kazakhs, and Kyrgyz). The third list contains exporters of the products from China to the United States made by entities outlined in the first two lists. The final and fourth list includes entities and facilities sourcing material from Xinjiang, including the Xinjiang Production and Construction Corps as well as the regional government, in furtherance of government forced labor schemes (e.g., poverty alleviation and pairing-assistance programs). The UFLPA Entity List is a positive compliance tool, although DHS warns against construing it as an all-encompassing registry of entities engaged in the targeted forced labor practices.

FLETF additionally released a long list of evidence that Importers of Record can provide to rebut the CBP presumption of forced labor in their supply chains under UFLPA. Some of the basic approaches have been around for some time, such as supply chain mapping, active supplier management, and collection of source tracing information. The practical challenge becomes one of collecting and presenting the best available evidence for the absence of forced labor on a particular good. Valuable evidence may include compliance policies, certificates of origin, bills of lading and other documents showing chain of custody, and internal monitoring of company practices as well as external supplier audits.

CBP will also consider any evidence showing that goods, and their raw material inputs, were not produced in Xinjiang Region as useful to rebut the presumption of forced labor. If the goods were definitively produced in the Xinjiang Region, then the presumption of forced labor can be overcome by showing that the goods were not mined, manufactured, or produced with forced labor. Photos of operations and employees as well as examples of employment contracts and employee residential addresses are useful. However, the burden on the importer is high in this case and (as for all of these detentions) it is difficult to prove a negative. The presumption is subjective and may prove difficult to overcome even when armed with the information CBP FLETF describes.

Finally, when a detention notice is ultimately received, there is typically a 30-day window within which to present evidence rebutting the allegation of forced labor. The supply chain mapping, original documentary evidence, and representations of internal compliance programs described in this section serve as the foundation for rebutting as best as possible that allegation. If these steps were accomplished in advance, then requests for additional time may be available to develop a quality record through collaboration with suppliers. Storage fees and other costs will accrue during this period, which makes close collaboration with your freight forwarder helpful, because in some instances lower-cost options (such as third-party bonded warehousing) may be available. Ultimately, if the presumption cannot be rebutted in the sole discretion of CBP, then the goods must be either re-exported to another country or forfeited to the U.S. We then explore the availability of cost recovery and other claims against foreign suppliers of the goods.

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