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Withhold Release Orders (WROs): Supply Chain Diligence, Compliance, and Best Practices

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Authors: Jonathan R. Todd, J. Philip Nester

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The Biden Administration's interest in reducing the occurrence of forced labor or indentured child labor in the global supply chain, and the parallel goals of corporate social responsibility, are driving increased attention on Withhold Release Orders (WROs) enforced by U.S. Customs and Border Protection (CBP). The challenge of strategically implementing responses to these objectives and the enforcement risk can be daunting to say the least. Today and for the foreseeable future, enterprise leadership and their in-house counsel are tasked with scrutinizing, mapping, and documenting the entire end-to-end supply chain, from the earliest procurement of raw materials through foreign manufacturing and ultimately import to the United States. This article provides high-level commentary on the WRO legal regime and what it can mean in practical terms for global sourcing.

WRO Legal Authority

U.S. Congress tasked CBP with enforcement of a prohibition against importing any goods that are mined, produced, or manufactured wholly or in part with forced labor, which means all work or service that is enacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer voluntarily. [19 USC § 1307] CBP has broad enforcement discretion under regulations at 19 CFR § 12.42. Enforcement involves withholding any import where there is "reason to believe" that forced labor practices were used in the production. Targeted imports may involve high-risk commodities, geographic regions, or foreign manufacturers. The subject of WRO interest over the last year has largely focused on the Xinjiang Uyghur Autonomous Region in the People's Republic of China, although many other active WRO programs are in effect.

Compliance Risk and Enforcement Defense

Importers are required by statute to observe and exercise reasonable care by ensuring imported goods comply with U.S. laws and regulations. [19 USC § 1484] This requirement applies to all imports; however, it has high practical significance in the context of forced-labor discussions because of the resulting need for consideration of the entire global supply chain, places of production, and manufacturing processes. Violations of the forced-labor prohibition on imports can include civil penalties "by fraud, gross negligence, or negligence" where goods are imported by means of false information or material omissions. [19 USC § 1592] In the extreme, companies and individuals can face criminal and civil penalties under anti-trafficking laws, where they knew or recklessly disregarded how the labor was obtained on imported goods. [*Id.*]

If CBP chooses to withhold release of goods under a WRO program, then the burden of proof shifts to the importer, who must submit documentary evidence supporting the lawful entry of those goods. [19 CFR § 12.43] This exercise largely amounts to demonstrating due diligence and the source of the item, as well as its inputs, to show the absence of forced labor (essentially, proving the negative). The importer must provide a Certificate of Origin signed by the foreign seller or owner of the goods, consistent with 19 CFR § 12.43. Additionally, the importer must submit documentary evidence that it made every reasonable effort to: (1) determine the source of the merchandise, including its component parts and (2) ascertain the character of labor used in the production, including the results of the investigation coupled with a statement of the importers' beliefs with respect to the class of labor used during production. Other supporting documentary evidence may be helpful to trace the movement of goods through the supply chain from point of origin to production, processing, and importation to the U.S., including: (1) affidavits from producers; (2) purchase orders, invoices, and proof of payment; (3) a list of producers across the production steps; (4) transportation documents; and (5) worker timecards, wage payment receipts, and the like. Every supply chain and every detention is fact-specific, and the persuasive value of available supporting documentation will vary case by case.

The presentation of sourcing documents and other relevant materials must occur within three (3) months following detention of the goods. CBP determines whether to release the goods only after the importer submits this evidence. Even if the goods are released, CBP reserves the right to demand their redelivery if it is later suspected that they violate WRO within 30 days of the release. If CBP is unsatisfied that there is clear evidence the goods were not produced by forced labor, and the goods are not exported from the U.S., then the items will be forfeited to the U.S. government.

WRO Best Practices

Starting with the foundational understanding that importers must exercise "reasonable care" in their compliance activities, pragmatic processes and business practices can be developed for the supply chain under review. A comprehensive grasp of inputs and production is required, including assessing the risk of forced labor for the particular items, manufacturers, and regions. Four basic types of compliance activities can be built upon this set of facts to assist in meeting the duty of care standard: (1) conducting supply chain due diligence; (2) maintaining a comprehensive social compliance system; (3) obtaining Certifications of Origin and additional supporting documentation; and (4) including a forced labor prohibition provision in contracts.

These activities will help manage the risk of sourcing products from outside the U.S. while generating documentary evidence for use in the event of detention due to a suspected WRO violation. However, many additional pragmatic compliance tools are available and may be incorporated into the supply chain sourcing program where appropriate based upon the importer enterprise's risk profile, tolerances, and foreign relationships. Thoughtfulness in designing the compliance program is often key, since the penalties associated with WRO non-compliance may pale in comparison to the effect this may have on preventing or delaying products from coming to market or the reputational harm it may cause in the minds of consumers and investors. The team at Benesch are well versed in all aspects of the global supply chain, as well as the impact of recent disruptions, and are available to assist in developing pragmatic approaches to today's supply chain challenges.

Jonathan Todd is a partner in Benesch's Transportation and Logistics Practice Group whose practice includes U.S. Customs compliance. He may be reached at (216) 363-4658 and jtodd@beneschlaw.com. Phil Nester is an associate in the Transportation and Logistics Practice Group who may be reached at (216) 363-6240 and jpnester@beneschlaw.com.