

5 Ways To Address Heightened Forced Labor Compliance Risk

By **Joyce Rodriguez and Francesca Guerrero**

In 2020, U.S. Customs and Border Protection, the U.S. Department of Commerce and the U.S. Department of the Treasury ramped up their efforts targeting companies around the world that are benefiting from forced labor.

It is likely this trend will continue given bipartisan support for eliminating forced labor from the U.S. supply chain, President Joe Biden's promise to emphasize human rights in U.S. foreign policy and continued parallel actions by countries worldwide.

This increased enforcement and regulatory exposure, combined with growing global awareness and stakeholder pressure on companies, underpins the need for sustained vigilance regarding the potential existence of forced labor in foreign supply chains.

This article highlights trends related to forced labor and ways to leverage available resources to assess and mitigate a company's risk profile in this area.

A Growing Concern Around the World

According to the International Labor Organization, more than 25 million people around the world are subjected to forced labor in the production of goods and services. More than half of those facing exploitation work in the private sector, and their numbers continue to rise.

Given these statistics, it is not surprising that many governments are acting to end child and forced labor in their market supply chains. For example, while mandatory disclosure laws have existed for some time in jurisdictions including the European Union,[1] the United Kingdom[2] and California,[3] we are seeing current legal requirements strengthened and new jurisdictions coming aboard.

In September 2020, the U.K. published its response to the 2019 public consultation of the U.K. Modern Slavery Act of 2015.

The U.K. indicated that it aims to considerably strengthen the act's transparency provisions, requiring companies to publish annual statements confirming steps taken to avoid forced labor and other forms of modern slavery in their supply chains.[4] U.K. companies will need to submit annual compliance statements to a government registry.

Similarly, Australia's Modern Slavery Act of 2018, which became effective in January 2019, requires certain companies to publicly disclose the steps they are taking to keep their supply chains free from forced labor. Other countries, like Canada and Switzerland, are considering similar initiatives and legislation mirroring these efforts to combat forced labor.

Most recently, there has been a global condemnation of the Chinese government-led system of forced labor exploitation of Uighur, ethnic Kazakh and Kyrgyz, and other Muslim minority groups in the Xinjiang Uighur Autonomous Region, or XUAR. Many countries, including the



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U.S., Canada and the U.K., have implemented measures severely restricting imports of goods from the XUAR region.

For example, on Jan. 12, the U.K. and Canada made parallel announcements outlining new measures to combat forced labor and human rights violations. Similar efforts have emerged in the EU, with a recent resolution that could allow the EU to target Chinese officials in the XUAR under newly adopted laws that allow international sanctions for human rights abuses.[5]

Increased Use of U.S. Import Restrictions and Penalty Enforcement

Since its inception, Section 307 of the U.S. Tariff Act of 1930 has prohibited the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labor.

The original statute included a consumptive demand-clause loophole, which, until its repeal by the Trade Facilitation and Trade Enforcement Act of 2015, had allowed importation of certain forced labor-produced goods if the goods were not produced "in such quantities in the United States as to meet the consumptive demands of the United States." Since the repeal, there has been a marked increase in enforcement of Section 307 by CBP.

For example, from 2016 to 2021 CBP issued 30 withhold release orders targeting imports of forced labor-produced goods, compared with 38 withhold release orders issued from 1958 to 2015.

A withhold release order directs the port to detain certain goods from a country or region until CBP reaches a final decision on whether the goods were produced in whole or in part through forced labor. The evidentiary burden for an importer to prove a negative, namely that the products were not produced through forced labor, is substantial.

A withhold release order often causes a significant supply chain disruption. Most recently, on Jan. 14, CBP issued a withhold release order on all cotton and tomato products grown and produced by entities operating in China's XUAR, which is estimated to impact \$9.1 billion in goods.

The Forced Labor Division of CBP's Office of Trade, established in 2017, leads the enforcement of the prohibition on the importation of goods made from forced labor. In August 2020, CBP issued its first civil penalty for imports made with forced labor since the passage of the Trade Facilitation and Trade Enforcement Act.

This action was initiated after CBP received allegations from a nongovernmental organization. The importer, Pure Circle U.S.A. Inc., paid \$575,000 in fines for shipments of stevia products produced from stevia leaves processed in China with forced labor.

In July 2020, the United States-Mexico-Canada Agreement's strong labor enforcement provisions came into force. Among other things, its labor chapter provides for the rapid response mechanism, which is intended to hold companies in Mexico accountable for violating certain labor laws, including the use of child and forced labor.

Private companies and persons can submit a petition triggering an investigation by the Interagency Labor Committee. Notably, the USMCA Forced Labor Enforcement Task Force has also been established to advance U.S. enforcement efforts pursuant to the USMCA's labor provisions and the Tariff Act. We expect 2021 to see the first usage of this

mechanism.

Use of Economic Sanctions Against Forced Labor Abusers

The Department of the Treasury's Office of Foreign Assets Control has a long history of sanctioning individuals and entities for their direct or indirect involvement in human rights abuses and forced labor.

An executive order recently issued pursuant to the Global Magnitsky Act of 2017 broadly authorizes OFAC to sanction any person engaging in significant human rights abuses. Pursuant to the authority, OFAC has designated over 200 persons to the specially designated national and blocked persons list.

Over the past year, OFAC has focused sanctions on companies and individuals involved with the exportation of forced labor, not only from the XUAR but also North Korea. In the second half of 2020, numerous officials and companies, including one of China's largest producers, Xinjian Production and Construction Corps, were also designated to the SDN List for engaging in serious human rights abuses and forced labor involving ethnic minorities in the XUAR.[6]

U.S. companies are not only prohibited from importing goods made by these companies, but also from engaging in nearly all transactions with SDNs.

How to Leverage Compliance Tools to Assess and Mitigate Forced Labor Risk

Given the intensified international focus on eliminating forced labor, child labor and human rights abuses, companies must assess labor conditions in their supply chains and avoid unintended use or facilitation of imports and exports to and from countries or entities known for committing human rights violations.

This means properly assessing and addressing risk or gaps in compliance with applicable labor laws in the supply chain at various levels.

1. Rely on objective sources to determine applicable risk indicators.

The U.S. Department of Labor's biannual list of goods produced by child labor or forced labor is a trusted authority identifying products from around the world that are at high risk of production by forced and/or child labor.[7] Other NGO sources also provide lists of companies that have been accused of using child or forced labor.

In addition, multiple reputable NGOs offer online resources highlighting potential red flags, or indicators of forced labor conditions and practices that companies can rely on to assess and monitor risk in their supply chains.

Applicable red flags will vary by industry, commodity and region. Some sectors, like textiles and minerals, or regions, like Xinjiang, are at higher risk for exploitation of labor workers.

2. Understand and identify relevant supply chain risks.

After a company determines the risk indicators for forced labor in the relevant industries, commodities and countries, it can assess the risk level posed by third parties in its supply chain. The more red flags or significant indicators of forced labor, the higher the risk of worker exploitation.

The opposite is also true: the fewer indicators, the lower the risk. Some risk indicators, like forced labor allegations, can be assessed through no-contact research. Others, however, may require more information from third parties in the supply chain to understand their labor force and labor practices.

3. Conduct due diligence based on risk level.

Once a company understands the risk level posed by parties in its supply chain, it can undertake further due diligence efforts as appropriate. Reasonable due diligence will vary from party to party and can range from a forced labor compliance questionnaire to conducting an on-site inspection.

Other due diligence may include anti-child and forced labor certifications, interviews with on-site personnel, periodic inspections, requests for codes of conduct or third-party training.

4. Leverage compliance tools to ensure prevention and mitigation of risk.

Many importers and exporters already have policies and procedures to ensure compliance in areas including anti-bribery, ethics and trade. These policies and procedures can be adapted to include measures to enhance compliance with forced labor laws.

Existing procedures for vetting and monitoring third parties can be expanded to address forced labor risk. Geographic risk indicators used in trade compliance may be applied to forced labor risk.

In addition, many industries have organized initiatives to combat forced labor. Tapping the resources of these collective actions can be an efficient way to mitigate supply chain risk.

5. Maintain detailed records.

Implementing good record-keeping procedures is critical when faced with claims of false labor. Goods held by CBP may be released if presumptions of forced labor can be rebutted. These records are also essential to meeting disclosure requirements and defending against government actions or allegations regarding forced labor.

All due diligence efforts should be documented and the records kept for a minimum of five years. Keeping thorough and accurate records of steps taken to prevent, monitor and remediate risks are essential to maintaining and auditing an effective compliance program.

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[1] EU Directive 2014/95 on disclosure of non-financial information.

[2] U.K. Modern Slavery Act 2015.

[3] California Transparency in Supply Chains Act, 2010.

[4] U.K., Crime, Justice and Law Consultation Outcome: Transparency in Supply Chains (Sept. 22, 2020) (<https://www.gov.uk/government/consultations/transparency-in-supply-chains>).

[5] European Parliament Resolution 2020/2913 (Dec. 15, 2020) (https://www.europarl.europa.eu/doceo/document/B-9-2020-0436_EN.html).

[6] See, e.g., U.S. Department of the Treasury, Press Release, "Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act" (Jul 9, 2020) (available at <https://home.treasury.gov/news/press-releases/sm1055>); U.S. Department of the Treasury, Press Release, "Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order" (Jul. 30, 2021), available at <https://home.treasury.gov/news/press-releases/sm1073>).

[7] DOL, List of Goods Produced by Child Labor or Forced Labor (Sept. 30, 2020) (<https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>).