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Companies seek guidance on supply chain enforcement

By Dominic Fracassa

California earned an international reputation as a forward-thinking proponent of human rights when it passed landmark legislation forcing companies to be more open about their efforts to cut human trafficking and wage slavery from their supply chains.

But more than 19 months after the Transparency in Supply Chains Act of 2010 took effect, its advocates are becoming impatient for direction or enforcement from the state attorney general, who possesses the sole power to issue injunctions against companies who fail to meet the act's requirements. A spokesman declined to comment on the office's enforcement plans.

Still, many compliance attorneys believe Attorney General Kamala Harris is poised to break the silence soon. Some are convinced that when she does, the ramifications for businesses could stretch far beyond state-issued injunctions. The court of public opinion, they say, could be especially damning for noncompliant companies.

"Injunctive relief is the tip of the enforcement iceberg, but that's all you need to sink the ship," said Perkins Coie LLP partner T. Markus Funk, who specializes in white collar defense.

The law was designed to give the public the ability to shop with their conscience by patronizing companies that are diligent about keeping their supply chains free of conflict.

Since Jan. 1, 2012, retailers and manufacturers doing business in California that report \$100 million or more in gross receipts from worldwide sales have been required to place a disclaimer on the home pages of their websites outlining the steps they take - if any - to expose and root out forced labor and other unethical practices that may take place among their vendors and suppliers.

Any forthcoming action from Harris' office will likely expose companies failing to meet the act's requirements to a deluge of additional scrutiny from nongovernmental watchdog agencies and plaintiffs' attorneys, Funk said. He said such "naming and shaming" may prove to be the motivating force that ultimately compels companies to comply.

"They're waiting for the attorney general to make the first move ... and once that piece falls, then you'll have advocacy groups and consumer groups putting pressure on a company; you'll have the media writing articles and you'll have plaintiffs' attorneys contemplating avenues of attack," Funk said. "Reputational concerns for board members and executives and the companies are significant."

While many agree that the reputational component is central to the law's intent, not everyone believes compliance will have a domino effect. Because the law narrowly defines injunctive relief as the sole enforcement remedy against noncompliant companies, outside parties looking for an opening to sue may not find the kind of inducements they're looking for, according to Pillsbury Winthrop Shaw Pittman LLP counsel Amy L. Pierce.

"Because of the nature of the remedy that might be available to them, looking at monetary compensation, there's not a clear-cut path. It's unclear if a court would entertain a class action under the unfair competition law, for example," Pierce said.

While the attorney general's lack of guidance leaves lawyers to speculate on her enforcement plans, some recent developments signal she's under pressure to act and has at least some of the tools to do so.

Questions and Comments

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Corporate

Companies seek guidance on supply chain enforcement

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Administrative/Regulatory

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Law Practice

Ex-LA city attorney back in private practice

After a failed bid at re-election, Carmen "Nuch" Trutanich has returned to law firm life, as counsel in the Los Angeles office of Tucker Ellis LLP.

Litigation

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The act dictates that the California Franchise Tax Board must furnish the Department of Justice with an annual list of which companies are required to disclosure their supply chain oversight practices based on those businesses' tax filings. Nicholas Pacilio, a spokesman for the attorney general's office, confirmed that they received the list earlier this year, but he declined to share what they planned to do with it.

Meanwhile, human rights advocacy groups, including San Francisco-based Humanity United, have been calling on the Franchise Tax Board to release the list of companies required to comply with the act. In a letter sent to the tax board in May, the group argued that the list qualifies as a public record under the provisions of the California Public Records Act.

Tax board spokesman John Barrett confirmed that multiple advocacy groups have made repeated attempts to get access to the list, but he maintained the board's position that the list must remain confidential because a company's inclusion in the list would reveal their income range.

"This is confidential taxpayer information exempt from disclosure under the California Public Records Act," Barrett said.

It's unusual for the act to have received seemingly no attention from law enforcement, said Jeffer Mangels Butler & Mitchell LLP partner Anthony Pacheco. He noted both businesses and the public stand to benefit greatly from the push to clean up human trafficking in supply chains. The lack of enforcement, he said, detracts from the spirit of the law and potentially renders it toothless - companies trying to do the right thing see little benefit from their actions, while companies averse to compliance are comforted.

"The act itself is well-meaning, but the lack of enforcement is problematic and a lack of discussion about why that's the case is concerning," Pacheco said. "It's important to know where we are in the application of the statute. People don't understand if this is just rhetoric or if there is some substance to our laws in this regard."

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Law Practice

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Government

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A contemporary abortion law

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Family

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Labor/Employment

9th Circuit joins chorus against NLRB ruling

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Law Practice

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