

We Trust Santa's Factory is Free of Forced Labor and Corruption—Your Supply Chains Should Be Too.



[Warning: The juxtaposition of the jolly old man and forced labor is not to make light of human rights violations but to highlight the hidden evils in supply chains and the potential reputational damage to wholesome brands.]

Imagine the public relations nightmare poor Santa Claus would face if forced labor or corruption was found in his factory. Or, what if toys for good boys and girls were found to be made by child labor rather than by happy elves? Certainly, Santa would not tolerate such issues, and we hope he has appropriate safeguards in place. Your company should be no different—think about how such a North Pole controversy could damage your brand's reputation. This holiday retail season, be sure that forced labor and bribery do not undermine the success of your critical sales period (and beyond).

"Forced labor"—a broad term that includes trafficked, child, slave and indentured labor—is no longer primarily a PR/marketing concern. During the past several years, legislatures in the United States, Europe and elsewhere are demanding that companies rid their supply chains of forced labor—and bribery. The real-world challenges facing companies trying to ensure supply chain integrity are undeniable but the consequences of violations can be disastrous.

Forced Labor: A Global Epidemic

Forced labor has reached epidemic proportions, and it is an issue that must be taken seriously. While bribery and corruption can certainly take place without forced labor, the opposite is not true; bribery of such foreign officials as immigration, factory and labor inspectors is *part and parcel* of virtually any foreign operation systematically using forced labor. And there are many such foreign operations. Consider these recent best estimates related to forced labor:

- It is a criminal industry valued at \$150 billion, second only to narcotics and greater than arms smuggling.
- There are approximately 24.9 million global victims annually.
- More than 160 countries are either source, transition or destination countries for forced labor.
- Forced labor taints products consumers use every day.

The effectiveness of some initiatives might be debatable, but forced labor in supply chains is no longer simply grabbing the attention of a handful of advocacy organizations. Retailers and manufacturers—in particular, those that are public facing—are experiencing mounting pressure from advocacy and consumer groups, as well as from governmental and law enforcement.

This increased focus on supply chains has been especially evident in relatively recent enactments of, and amendments to, forced labor laws in the United States, Europe and elsewhere. Several developments, detailed below, demonstrate why exercising strict control over supply chains is today's business imperative.

- **California Transparency in Supply Chains Act (S.B. 657).** The California Act, signed into law in 2010, *requires* qualifying companies (retailers or manufacturers with more than \$100 million in global receipts and with assets or payroll over \$50,000 in California) to disclose, through a link on their website homepage, the precise nature and scope of their efforts (or lack of efforts) to eradicate forced labor from their worldwide supply chains. Specifically, for example, they must answer questions concerning audits of suppliers and maintenance of internal accountability standards. Companies making false or misleading disclosures can expect to draw consumer and class action lawsuits and government attention.
- **Trade Facilitation and Trade Enforcement Act of 2015.** This enactment, which took effect March 10, 2016, closed a long-standing loophole by amending the Tariff Act of 1930 to remove the controversial “immunity” for broad classes of goods made with forced labor that once met “the consumptive demands of the United States.”
- **Requirements for Federal Contractors and Their Subcontractors.** In the wake of President Obama’s Executive Order on Trafficking in Government Contracts, the 2015 version of the Federal Acquisition Regulation (FAR) added six more categories of prohibited conduct, going far beyond overtly violent or coercive conduct. The 2015 version of the rule—requiring automatic self-reporting and featuring no *de minimis* exceptions or safe harbors—prohibits several types of conduct not covered by the 2009 FAR. This includes the use of recruitment fees, withholding of identity or immigration documents such as passports or drivers’ licenses, failure to pay return transportation costs, provision of substandard housing and failure to provide written work documents in the workers’ native language where required to do so by law. Potential criminal and civil penalties, as well as debarment, give these provisions particularly sharp teeth. Read more in this flow chart about the requirements and logic of the FAR provisions.
- **United Kingdom’s Modern Slavery Act 2015.** Companies with business interests in the United Kingdom are now subject to another anti-trafficking regime. On the heels of the United Kingdom’s Bribery Act 2010, which is a close analog of the U.S. Foreign Corrupt Practices Act, the U.K. government has now borrowed significantly from the California Transparency in Supply Chains Act to impose its own stricter disclosure framework. The U.K. act, passed by Parliament in 2015, requires companies to make a slavery and human trafficking disclosure statement on their websites. Read more in this flow chart about the details of the U.K. act’s requirements and logic.
- **Mayor of Houston’s Executive Order (EO 1-56).** In October 2017, Mayor Sylvester Turner made the bold step to sign his executive order, Zero Tolerance for Human Trafficking in City Service Contracts and Purchasing; it’s expected that other municipalities will join Houston’s “first move” in the fight against human trafficking. The mayor’s executive order signals his strong commitment to protect the people of Houston from forced labor and reflects the strategy found in the FAR discussed above: utilizing purchasing power to ensure city contractors implement protections against forced labor, as detailed here.

- **Pending Legislation in Other Countries.** There is pending anti-trafficking/supply chain legislation in France (“Devoir de Vigilance”), Spain, the Netherlands and Sweden, and reportedly in Switzerland, Germany, Australia and elsewhere. There is also the possibility that similar measures could be adopted by the European Union, thereby setting up a default “global standard.”

In addition, organizations such as China Labor Watch, KnowTheChain, Slavery Footprint, Global Exchange and Free2Work, as well as such media outlets as Al Jazeera, CNN, *Conscious Magazine*, *The New York Times* and *TIME* magazine, are increasingly scrutinizing the conduct of Western companies with transnational supply chains originating out of the developing world. Their high-profile focus has been on companies with household names selling directly to consumers, but it has also expanded to a broader class of retailers and manufacturers.

Some Good Cheer: Compliance Is Challenging, Serious *and* Achievable

The above summary points out the increasing expectations of supply chain compliance concerning both forced labor and bribery/corruption. Given these new realities, retailers and manufacturers of all sizes must ensure the following:

1. Anti-forced-labor statements **100%** accurately reflect the company's actual practices;
2. Anti-corruption compliance efforts take into consideration the dangers of forced labor; and
3. Compliance practices are robust enough to withstand the heightened public and enforcer scrutiny.

The past way of thinking about compliance is insufficient, and companies must specifically focus to meet today's requirements in these developing, specialized areas. Experienced, practical and informed approaches are critical to developing and implementing a supply chain compliance program, as well as to updating an existing program with a compliance tune-up. Contact experienced counsel to discuss the challenges as well as the solutions to supply chain compliance.

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