



California Lawyers Association

presents

Human Trafficking and Corporate Compliance

1.25 Hours MCLE

Friday, September 22, 2023

1:45 PM - 3:00 PM

Speakers:

Patrick Miller

Shanish Aloor

Conference Reference Materials

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US Government Prohibitions on Forced Labor and the Uyghur Forced Labor Prevention Act

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Evolution of US Govt Enforcement

- Section 307 of the Tariff Act of 1930 prohibits imports of goods produced using forced labor.
 - Almost 28 million people currently are victims of forced labor, according to the International Labour Organization,
- If a product is suspected of being made through forced labor, US Customs & Border Protection can issue a withhold release order (WRO), which explains how & why it will detain certain products at the port.

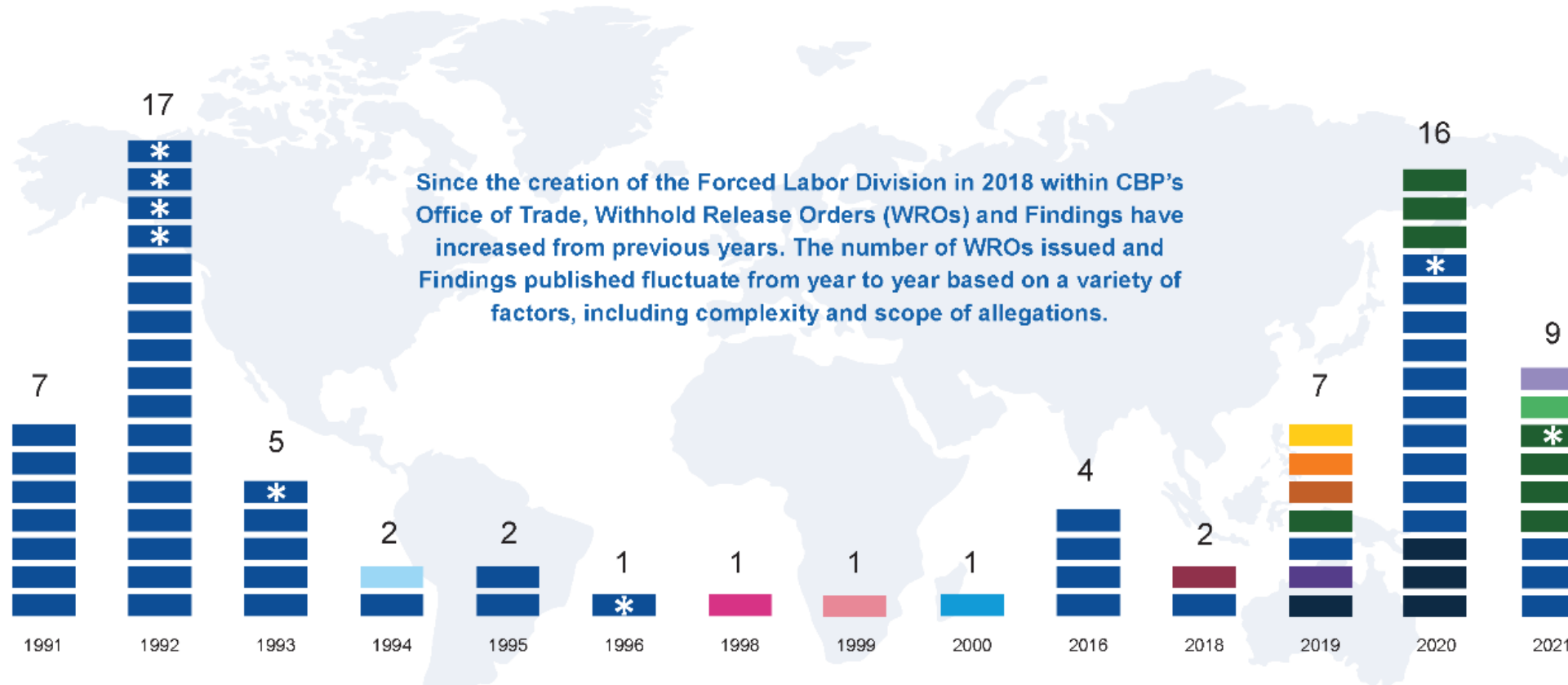
Evolution of US Govt Enforcement (contd)

However, Section 307 has not always been vigorously enforced.

Use of Section 307 increased substantially in the early 1990s with an increase in Chinese exports to the US. Between 1991 and 1995, Customs & Border Protection issued 27 WROs against manufacturers in China.

Between 2000 and 2016, CBP did not issue any WROs.

Forced Labor Enforcement Actions WROs & Findings by Year 1991-2021



- Taiwan
- Turkmenistan
- DRC
- Brazil
- Malaysia
- WRO
- China
- Nepal
- Malawi
- Mexico
- Fiji
- * Finding
- Mongolia
- India
- Zimbabwe
-
- Japan

WROs surge after 2016

- USCBP began issuing WROs at an increased pace from 2016 onward once the *consumptive demand* clause was [repealed](#).

WROs after 2016 (contd)

- The WROs involved:
 - Prohibitions on products from entire countries (eg gold from DRC; tobacco from Malawi; and cotton from Turkmenistan);
 - Prohibitions on products from certain suppliers (eg apparel suppliers from India; glove suppliers from Malaysia; and tomato suppliers from Mexico)

Congress passes the UFLPA in 2021

- The increased enforcement activity has culminated in the passage of the Uyghur Forced Labor Prevention Act (“UFLPA”).
- The UFLPA went into effect in June 2022.

What is the Uyghur Forced Labor Prevention Act (“UFLPA”)?

- The Act presumes that a product has been produced using forced labor (*and thus prohibited from entry into the US*) if:
 - any component was produced
 - (1) in the **Xinjiang region** of China; or
 - (2) by any of the listed **prohibited entities**
- Key targeted products: silica based products, cotton, and/or tomatoes.



2 Key UFLPA Questions

(1) Are my goods subject to the Act?

- *Have I mapped my supply chain – can I prove it?*
- *Do my goods have cotton, tomatoes, or silica-based products?*

(2) If so, can I prove there is no forced labor?

- *Companies have had goods released if they show the Act doesn't apply, but there have been no reports of importers rebutting the presumption where the UFLPA is applicable.*

Recent Developments in Forced Labor Enforcement

- In [August 2022](#), CBP targeted shipments valued at more than \$266 million on suspicions of forced labor, including UFLPA issues. Additionally, the U.S. Department of Labor added [32 products](#) — among them acai berries from Brazil, gold from Zimbabwe and tea from India — to its list of goods possibly made with child or forced labor.
- 4 Aug 2022: [Federal Register Notice](#) indicates more companies will be added to the UFLPA Entity List – even companies based outside of Xinjiang that participate in *poverty alleviation or pairing assistance programs* involving Uyghur labor.
- 31 Aug 2022: Report issued by [UN Office of High Commissioner for Human Rights](#) which states: “[s]erious human rights violations have been committed in [Xinjiang]...”

Recent Developments (contd)

- **Increased enforcement budgets:** Congress granted \$37.5M in 2022. However, for FY23, the number has climbed past the \$70.3M requested by the Biden Administration to somewhere north of \$100M.
- **Enforcement expanded beyond the key targeted products:**
 - Sheffield Hallam University [issued a report](#) late-last year on Automotive Supply Chains and Forced Labor in Xinjiang.
 - Red dates are small, pitted fruits popular throughout Asia and the Uyghur Human Rights Project issued a [report](#) estimating that 50% of China's red dates originate in the XUAR.

How can companies respond

Two Key Risk Areas:

- Are my goods subject to the UFLPA or existing WROs?
- Is there risk they might become subject to a new WRO?

How can companies respond (contd)

Risk Assessment:

- Map your supply chain with reliable documents/info to understand where your products originate.
- Research your products/suppliers through publicly-available sources and have frank conversations/audits with suppliers.
- Have document system in place to respond to USCBP inquiries efficiently.
- Contract clauses to prohibit these practices and provide reliable documents.

Model Contract Clauses

ABA Business Law Section Working Group:

- HRDD
- Document collection
- OLGM & Remediation
- Stepped Dispute Resolution



Patrick Miller is the **Founding Attorney** at Impact Advocates APC – a law firm focused on **helping companies resolve international legal disputes and establish responsible sourcing frameworks that comply with human rights regulations.**

International Arbitration

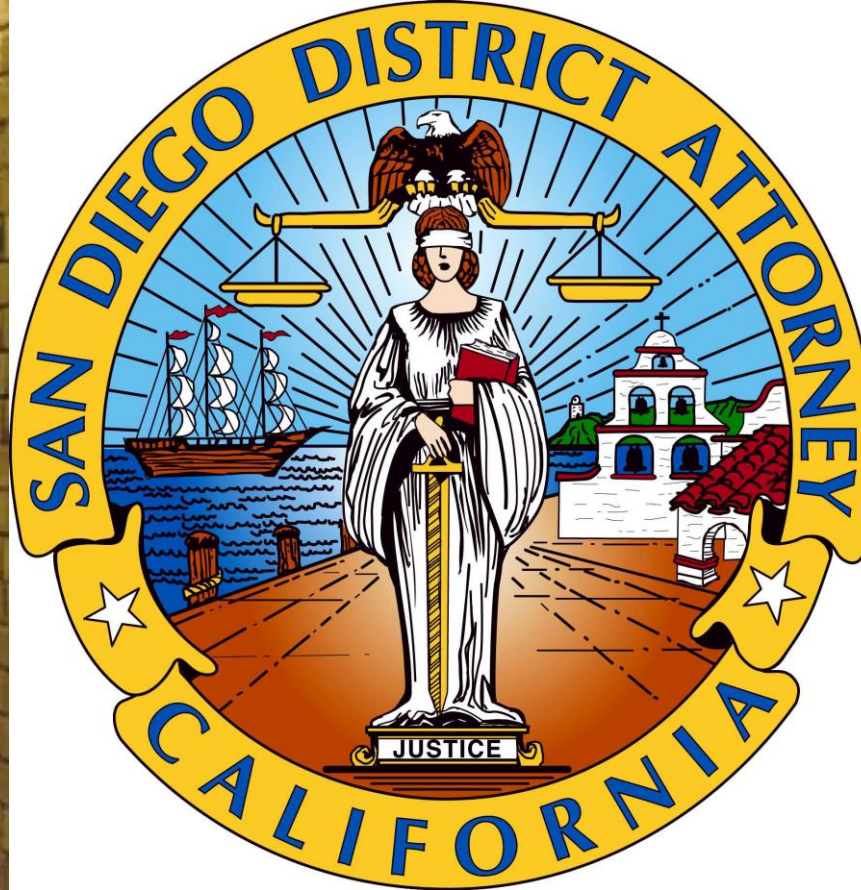
Patrick has worked in the US, Europe and Asia — spending nearly a decade in South-East Asia focusing on commercial disputes with a large international law firm. He’s worked beside (and against) some of the most well-respected practitioners in the industry on arbitrations involving sophisticated legal issues.

Responsible Supply Chains

Patrick helps companies establish responsible supply chain frameworks to address the global regulatory environment. His international commercial experience and involvement in the business & human rights community provides a balanced perspective on what can be achieved through responsible sourcing practices.

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LABOR TRAFFICKING AND WORKPLACE JUSTICE

Shanish Aloor, Deputy District Attorney

CALIFORNIA'S OFFICIAL DEFINITION:

“A person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking”

Penal Code 236.1

**CALIFORNIA'S
JURY
INSTRUCTION:**

1. Defendant either deprived another person of personal liberty or violated that person's personal liberty
2. When defendant acted, he intended to obtain forced labor

Cal Crim 1243

“Deprivation of Personal Liberty”

“Violation of Personal liberty”

CALIFORNIA'S OFFICIAL DEFINITION:

Substantial and sustained restriction of another person's liberty through:

- Fraud
- Deceit
- Coercion
- Violence
- Duress
- Threat of Injury

Under circumstances in which person receiving the threat believes that it is likely the person making the threat would carry it out.

**OTHER
CRIMINAL
LAWS
POTENTIALLY
VIOLATED:**

False Imprisonment PC236/237

Wage Theft PC487m

Kidnapping PC207

Terrorist Threats- PC 422



LABOR TRAFFICKING

- ❖ 70% entered legally
- ❖ Often recruited in home country
- ❖ Education varies

WHO IS VULNERABLE?

- ❖ Victims of poverty
- ❖ Refugees or immigrants on work visas
- ❖ Undocumented Immigrants
- ❖ Ethnic minorities
- ❖ Those with lack of education or understanding of the law.
- ❖ Groups who are suspicious of law enforcement.

FORCED LABOR

Even if victim had “independent reasons for staying in this country,” such as hoping to get an education and eventually receiving pay for work, the judge or jury can find that it was coercion, “not [victim’s] innocent hopes and dreams, that reasonably made her feel compelled to serve...[Defendants] cannot escape [the law] by contending that [they] subjected the servant to slightly less wretched conditions than she would have experienced elsewhere.”

United States v. Djoumessi (6th Cir. 2008)

VICTIMS ARE OFTEN...



Isolated... Escorted... Not in possession of their own documents... Unable or not allowed to speak for themselves... Telling a story that seems rehearsed or coached... Protective of their trafficker

- Law Enforcement should use Due diligence in identifying victims of HT (PC 236.2)
 - **REGARDLESS of CITIZENSHIP or LEGAL STATUS.**
- 1. Signs of trauma, fatigue, injury, or shows sign of poor care
- 2. Person is withdrawn or afraid to talk
- 3. Person does not have freedom to move
- 4. Lives and works in one place
- 5. Owes a debt to his or her employer
- 6. Person limited in who they can contact or be contacted by
- 7. Person does not have control over his or her own government issued id or immigration documents

WHERE ARE THE VICTIMS?

❖ Construction

❖ Janitorial

❖ Manufacturing

❖ Hospitality

❖ Restaurant

❖ Laborers

❖ Candy & Flower Sales

❖ Domestic Service

❖ Agricultural

❖ Health & Eldercare

SAN DIEGO'S COMBAT PLAN FOR HUMAN TRAFFICKING

ALWAYS VICTIM-CENTERED

Prevention

Protection

Prosecution

Partnerships

WHAT TO LOOK FOR

- Many people sleeping in one room (houses or businesses)
- Sleeping in the businesses (nail salon, massage parlor)
- Person has few or no personal possessions
- Person is not in control of his or her identification documents
- Person is not allowed to speak for themselves (third party does the talking)
- Person cannot clarify where they are staying or their address
- Person has numerous inconsistencies in his or her story

WHAT CAN YOU DO

- Professionally – look for signs in members of the public who you contact
- Personally – look for signs and educate your friends and family
- If you see something that causes you concern notify the authorities.

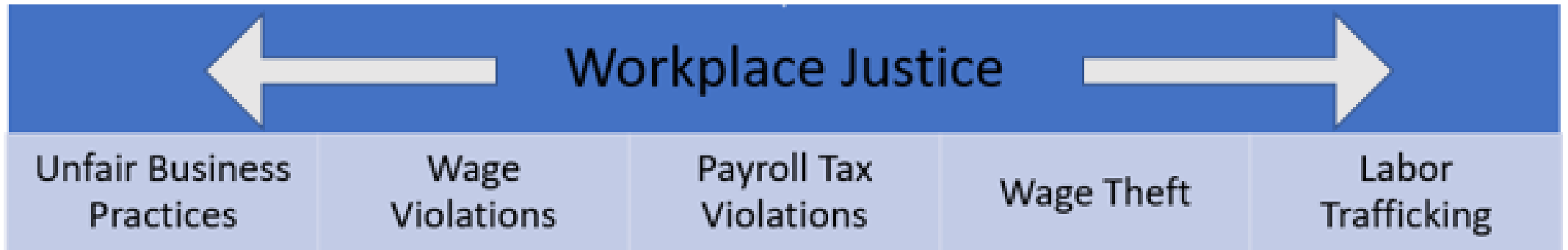
**Labor
Exploitation**

The diagram consists of three concentric circles. The outermost circle is dark gray and contains the text 'Labor Exploitation'. Inside it is a light green circle containing 'Labor Violations'. The innermost circle is dark red and contains 'Human Trafficking'. This visualizes that human trafficking is a subset of labor violations, which is a subset of labor exploitation.

**Labor
Violations**

**Human
Trafficking**

WORKPLACE JUSTICE UNIT



Workplace Justice Unit

Workplace Justice

- Unfair Business Practices
- Wage Violations
- Payroll Tax Violations
- Wage Theft
- Labor Trafficking

- Legitimate Business Owners Unable to Compete
- Not Paying Overtime
- Depriving Employee of Benefits
 - Meal and Rest Breaks
 - Workers' Compensation
- Payroll Tax Violations
 - Under the Table Pay
 - Withholding Taxes But Not Reporting Properly
- Forced Labor
 - Use of Threats, Violence and Manipulation
 - Debt Bondage
 - Concealment or Retention of Documents
 - Industry Shared Labor
 - Labor Broker
 - Recruitment of Victims By Victims

COLLABORATIVE EFFORT:

- Information Sharing
- Members to include:
 - **DIR** -Department of Industrial Relations
 - **SLC** - State Labor Commission
 - **EDD** - Employment Development Department
 - **CSLB** - Contractors State Licensing Board
 - **CDI** - California Department of Insurance
 - Human Trafficking Task Forces
 - **ABC** - Alcohol Beverage Control
 - **DOL** - Department of Labor
 - **OSLE** - Office of Labor Standards and Enforcement
 - Local Police
 - **DHS** - Department of Homeland Security



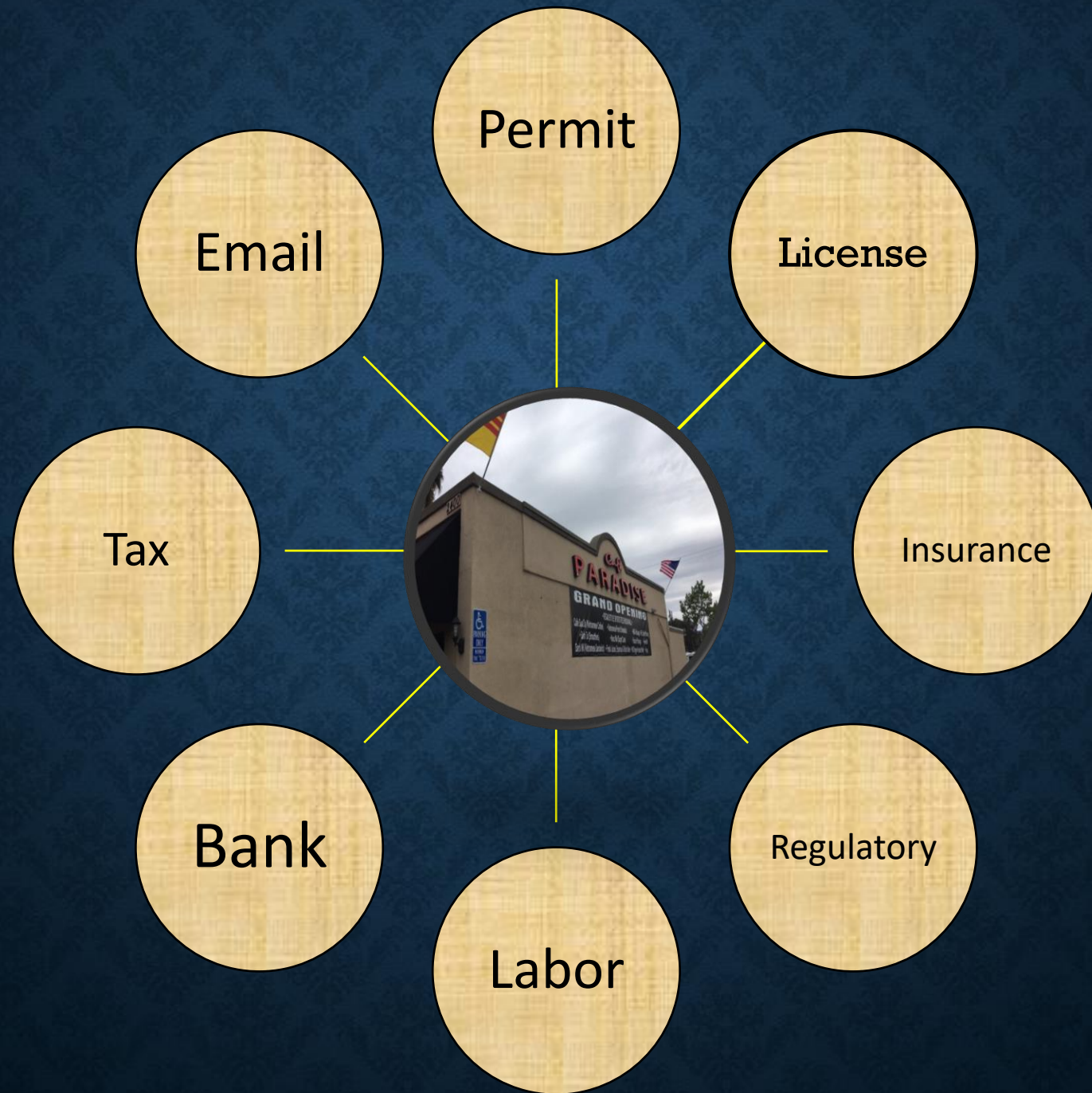
AREAS WE INVESTIGATE

- Recruitment/Hiring
 - Labor Contractor?
 - Internet/Newspaper Advertisement?
 - Promises/Representations Made/Broken?
- Transportation (Fees paid, Changes, Work to Pay)
- Housing (Conditions, Ability to Leave, Payment)
- Documentation (Employer to Hold, Work to Get Back)
- Communications (Limits, Instructions)
- Salary (How Determined, Recordkeeping, Changes, Check Cashing)
- Other Job Requirements (Required Purchases, Knowledge of Family Locations, When Can Stop)

**ANY
OVERLOOKED
PENAL CODE
SECTIONS?:**

Penal Code Section 487m:

the intentional theft of wages in an amount greater than nine hundred fifty dollars (\$950) from any one employee, or two thousand three hundred fifty dollars (\$2,350) in the aggregate from two or more employees, by an employer in any consecutive 12-month period may be punished as grand theft.





QUESTIONS TO ASK AND THINK ABOUT:

- How did they first find this work?
- How long have they worked at that location?
- How often do they move to another location?
- How do they get paid? Were they promised anything?
- Are they fearful of law enforcement involvement? Why?

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[\(https://journals.law.harvard.edu/ilj/\)](https://journals.law.harvard.edu/ilj/).

Evolution of Business & Human Rights Obligations – From Soft Law to Voluntary Initiatives to Emerging International

Standards & National Regulations

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PATRICK MILLER & KABIR DUGGAL*

Introduction

Milton Friedman famously stated that a business has no purpose except to increase shareholder value. This approach is increasingly dying.^[1] Most international commercial lawyers have a general sense of human rights law—though it is often dismissed as a collection of non-binding, aspirational pronouncements having little practical effect on the way business is conducted or how businesses advise their clients. Indeed, human rights law in international law is often understood as obligations of states in relation to humans with a limited role for business. As a result, businesses often have only a passing understanding of the legal regimes related to business and human rights (“B&HR”).

Businesses which are not steeped in these issues can be forgiven for assuming that regimes related to B&HR are limited to the non-binding, aspirational arena, particularly as this may have been true for a time. On the one hand, we see an increased focus on Environmental, Social, and Governance (“ESG”) obligations, although these tend to be non-binding or aspirational. At the same time, we notice the creation of hard law obligations which are enforced by national governments.

Inquiries into corporate misconduct in the 20th century rarely went beyond the question of whether corporations even had a duty to protect human rights. The international conventions described below were landmark milestones in setting out a coherent framework establishing the bounds of corporate conduct and the obligations that multinationals have to various stakeholders. These milestones laid a foundation for national governments to begin enacting “hard law” regulations.^[2] We expect that ESG and B&HR obligations will take a firmer form in the years to come—although these changes will often be a result of political pressure, national priorities, and global initiatives.

This article traces the key recent developments in B&HR from international agreements to some of the leading national regulatory regimes.

I. The International Framework

International law has traditionally focused on the role of states. While the role of

non-state actors has played a limited role, certain efforts to identify international obligations for businesses exist.

A. The UN Global Compact (<https://www.unglobalcompact.org/>) (2000)^[3]

Conceived by former UN Secretary Kofi Annan, the UN Global Compact is a voluntary initiative where companies commit to implement universal sustainability principles and take steps to support UN goals. The UN Global Compact is “**open (<https://www.unglobalcompact.org/about/faq>)**, to any company that is serious about its commitment to work towards implementation of the UN Global Compact principles throughout its operations and sphere of influence, and to communicate on its progress.”^[4] Principle 1 requires a company to comply with all applicable laws and internationally recognized human rights while Principle 2 requires that companies are not complicit in human rights abuses.^[5] The remaining **eight (<https://www.unglobalcompact.org/what-is-gc/mission/principles>)**, principles provide specific provisions for labor, environment, and anti-corruption.^[6] Even though the Compact is a voluntary initiative, by signing up, companies must produce an annual “Communication on Progress” (COP) that details their work to embed the ten principles in their activities. So far, **21,493 (<https://www.unglobalcompact.org/>)**, companies from 162 countries have signed up for the Global Compact.^[7]

B. The (Draft) Norms on the Responsibilities of Transnational Corporations (<https://digitallibrary.un.org/record/501576?ln=en>) (2003)^[8]

In 2003, a Working Group chaired by Professor David Weissbrodt submitted the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (the “Norms”) to the UN Sub-

Commission on the Promotion and Protection of Human Rights. The Norms were the first attempt to create human rights norms specifically aimed at transnational corporations.

There were specific Norms addressing non-discriminatory treatment, security of persons, rights of workers, anti-bribery provisions, consumer protection, and environmental protection. The document also identifies 14 obligations and 5 provisions aimed at implementing the Norms. The Norms were subject to “periodic monitoring and verification” by the UN, including by existing mechanisms, and a mechanism to be created regarding the application of the Norms. Even though the Norms were regarded as a landmark step, they were not approved by the UN Commission on Human Rights because they faced **opposition** (<https://ojs.deakin.edu.au/index.php/dlr/article/view/68/73>), from several states and the business community.^[9]

C. The UN Guiding Principles on Business and Human Rights

(https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf), (2011)^[10]

Following the failure of the Norms, the former UN Secretary General Kofi Annan appointed Harvard Professor John G. Ruggie as a Special Representative on Business and Human Rights. This led to the creation of the UN Guiding Principles on Business and Human Rights (the “Guiding Principles”). The Guiding Principles are based on three pillars: (i) a state bears the duty to *protect* against human rights abuses within its territory, (ii) a corporation must *respect* human rights and address adverse human rights impacts with which they are involved, and (iii) a state has the primary responsibility to *remedy* any human rights abuses within its territory.

While the Guiding Principles do not have a formal accountability mechanism,^[11] they envision that “effective grievance mechanisms” are available based on multi-stakeholder and other collaborative initiatives. As a largely voluntary initiative, the Guiding Principles are often invoked by parties in their international pleadings to argue the failure of due diligence (see **<https://jusmundi.com/en/document/pdf/other/en-bear-creek-mining-corporation-v-republic-of-peru-claimants-observations-on-the-non-disputing-party-written-submission-of-dhuma-and-dr-carlos-thursday-18th-august-2016>**),^[12] or **<https://jusmundi.com/en/document/pdf/other/en-daniel-w-kappes-and-kappes-cassidy-associates-v-republic-of-guatemala-guatemalas-counter-memorial-monday-7th-december-2020>**)^[13] or the need for human rights assessment (**<https://jusmundi.com/en/document/pdf/other/en-metlife-inc-metlife-seguros-de-retiro-s-a-and-metlife-servicios-s-a-v-argentine-republic-amicus-curiae-submission-monday-19th-july-2021>**)^[14]

D. Draft UN Legally Binding Instrument to Regulate Activities of Transnational Corporations

<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>,(2021)^[15]

Despite the failure of the Norms, since 2014, there have been efforts to create a Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprises (the “Instrument”). The Open-Ended Intergovernmental Working Group (OEIGWG) created by the UN Human Right Council drafted this Instrument. The Draft makes clear that the purpose of this Instrument is to clarify the human rights obligations of business enterprises and

facilitate the implementation of these obligations (art. 2.1). The Instrument places primacy of obligation on state parties who are required to “regulate effectively the activities of all enterprises within their territory, jurisdiction or otherwise under their control” (art. 6.1).

Art. 16 provides that states shall take all “necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms” to ensure implementation. Indeed, the Instrument envisions the creation of an International Fund for Victims to provide legal and financial aid (art. 15.7).

II. Efforts within National Law

We see a nascent effort to move obligations from voluntary regimes to obligations in domestic law. At this stage, the obligations are limited; however, with greater pressures from the public and with concerns about climate change, we might see further action. Listed below are examples of human rights obligations on businesses.

A. US: Uyghur Forced Labor Prevention Act (UFLPA)

(<https://www.congress.gov/bill/117th-congress/house-bill/1155/text>)

Since the 1930 Tariff Act, the US has had legislation prohibiting products created by forced labor from entry into the country. However, carveouts allowed nearly all products to escape inquiry by the Government.

Over the past few years, the US Government has sought to enforce its regulations prohibiting the import of goods produced using forced labor through its increasing use of Withhold Release Orders by the US Customs and Border Protection Agency

(“USCBP”) and its implementation of the Uyghur Forced Labor Prevention Act (“UFLPA”).^[16]

Many Guidance documents on complying with these regimes reference the Guiding Principles and other international best practices such as human rights due diligence as methods of ensuring that a company’s supply chains practices comport with their responsibilities under the law.

The UFLPA came into effect on 21 June 2022.^[17] It expands the scope of the US Government’s approach to prohibiting goods which it suspects were produced using forced labor from entering the US market.^[18] The enforcement plan for the UFLPA creates a **rebuttable presumption**

(https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf), that all goods (or component parts of such goods) imported into the US that have a nexus to the Xinjiang region of China, or a list of restricted entities that use Uyghur labor, were produced under conditions of forced labor.^[19]

The enforcement guidance **states (https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf)**, that US Customs and Border Protection “will implement an enforcement plan that identifies and interdicts goods from high-priority sectors that are found to have a nexus to production in Xinjiang, subsidiaries and affiliates of Xinjiang Production and Construction Corps, and any other producing entity found to utilize forced labor via a government-labor scheme.”^[20]

The UFLPA applies to all imports into the US and, importantly, does not contain a *de minimis* exception. Thus, even if one button on a jacket has a nexus to Xinjiang, this shipment would be prohibited from entry. It also applies to manufacturers that use

Uyghur labor in other areas of China if they are on the list of restricted entities. Its geographical scope is broader than the Xinjiang region.

If USCBP determines that products are within the scope of the Act, the evidentiary burden to rebut the presumption of forced labor is extremely high. There have not yet been any reports of importers successfully rebutting the presumption of forced labor. Rather, importers have **focused** (<https://impactadvocateslaw.com/insight/key-developments-in-uflpa-enforcement>), on demonstrating to the USCBP that the subject goods do not fall within the scope of the Act, i.e., they have no nexus to Xinjiang and/or Uyghur labor.

B. Due Diligence Regimes in EU Countries

The European Commission has **recently proposed** (<https://www.reuters.com/markets/europe/eu-proposes-banning-products-made-with-forced-labour-2022-09-14/>), a prohibition on the import and/or export of products that were produced using forced labor.^[21] Although some EU countries require multinationals of sufficient size to establish a human rights due diligence framework to identify and prevent human rights abuses, others, including **Germany**,

(https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=71731FA3BE835852C39F24D5BEFF8C60.delivery1-replication?__blob=publicationFile&v=2)^[22] and **France** ([https://www.business-](https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/)

[humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/](https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/)),^[23] have implemented human rights due diligence regimes for international supply chains.

Companies which are subject to the regulations by virtue of their size (e.g., employee numbers or revenue) must conduct their operations in accordance with governments' expanding ESG priorities. These companies, for instance, should develop contractual frameworks with their counterparties that solidify these requirements as obligations, particularly when their counterparties are not subject to similar ESG-type regulation. For example, Section 6 of the German Due Diligence law discusses implementing: (i) contractual assurances that suppliers will comply with human rights obligations; and (ii) contractual control mechanisms when abuses are discovered.

In February 2022, the European Commission made public its Draft Directive on the proposed standard for due diligence on human rights and environmental issues (the "EU Draft Directive").^[24] The EU Draft Directives applies to EU companies which have either (i) more than 500 employees and a net worldwide turnover of EUR 150 million, or (ii) more than 250 employees and a net world turnover of more than EUR 40 million provided 50% of the net turnover was in a "high risk" sector (such as textiles, clothing and footwear, agriculture, forestry, fisheries, and extraction of mineral resources among others). It also applies to non-EU companies which have either (i) net turnover of more than EUR 150 million in the EU, or (ii) net turnover of more than EUR 40 million but not more than EUR 150 million, provided that at least 50% of its net worldwide turnover was in a "high-risk" sector (art. 2). The EU Draft Directives lay down rules (i) on obligations for companies regarding actual and potential adverse impacts on human rights and the environment with respect to their operation, their subsidiaries, and the value chain operations, and (ii) on liability for violations of the obligations. The EU Draft Directive will be enforced by Member States that create supervisory authorities. These supervisory authorities can take remedial action, including the imposition of

sanctions. When pecuniary sanctions are imposed, they are based on a company's turnover (art. 20).

Conclusion

ESG obligations at the international and regional level remain at a nascent stage. With increased public focus and efforts by both the UN and the EU, however, we will likely see the creation of binding obligations that companies managing international supply chains will have to consider.

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[1] See Colin Mayer, Leo E. Strine Jr. & Jaap Winter, *50 Years Later, Milton Friedman's Shareholder Doctrine Is Dead*, *Fortune* (Sept. 13, 2020), <https://fortune.com/2020/09/13/milton-friedman-anniversary-business-purpose/>.

[2] Scholars have referred to a "Galaxy of Norms" which includes both international conventions and national 'hard law' obligations. See, e.g., Elise Groulx Diggs, Milton C. Regan & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 *Geo.*

J. Int'l L. 309 (2019).

[3] *The Ten Principles of the UN Global Compact*, United Nations, <https://unglobalcompact.org/what-is-gc/mission/principles> (<https://unglobalcompact.org/what-is-gc/mission/principles>).

[4] *About the UN Global Compact: Frequently Asked Questions*, United Nations Global Compact, <https://unglobalcompact.org/about/faq> (<https://unglobalcompact.org/about/faq>).

[5] *The Ten Principles of the UN Global Compact*, *supra* note 3, at Principles 1 and 2.

[6] *Id.* at Principles 3 to 10, available at: <https://unglobalcompact.org/what-is-gc/mission/principles> (<https://unglobalcompact.org/what-is-gc/mission/principles>).

[7] *United Nations Global Compact Website Cover page*, U.N. Global Compact, <https://unglobalcompact.org/> (<https://unglobalcompact.org/>).

[8] U.N. Econ. and Soc. Council, Sub-Comm'n on the Promotion and Prot. of Hum. Rts., *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), <https://digitallibrary.un.org/record/501576?ln=en#record-files-collapse-header> (<https://digitallibrary.un.org/record/501576?ln=en#record-files-collapse-header>).

[9] Pini Pavel Miretski ¶ Sascha-Dominik Bachmann, *The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem*, 17 Deakin L.R. 5, 8-9 (2012) ("Such explicit support for the

Norms was accompanied by often fierce opposition from various states and the majority of the business community. Such opposition arose from the moment the *Norms* were formally introduced as a discussion paper after their approval by the Sub-Commission. Most states expressed strong reservations, emphasizing their determination not to depart from the traditional framework of international law, which stresses the central and pivotal role of the state as a legal subject of public international law. The *Norms* were eventually abandoned in 2005 and the task of regulating transnational corporate accountability was transferred to other UN organs.” (internal citation omitted).

[10] *Guiding Principles on Business and Human Rights*, U.N. Office of the High Comm’r For Hum. Rts.

(2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

(https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

[11] In contrast, the 2011 OECD Guidelines for Multinational Enterprises provides for “National Contact Points” “to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines . . .” as well as the “Investment Committee” that shall “periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.” See *Procedural Guidance*, OECD

Guidelines for Multinational Enter. 68 (2011),

<https://www.oecd.org/daf/inv/mne/48004323.pdf>

(<https://www.oecd.org/daf/inv/mne/48004323.pdf>).

[12] *Bear Creek Mining Corp. v. The Republic of Peru*, ICSID Case No. Arb/14/21, Bear Creek's Reply to the Amicus Curiae Submissions of Dhuma and Dr. Lopez ¶ 18 (Aug. 18, 2016).

[13] *Daniel W. Kappes and Kappes, Cassidy and Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Guatemala's Counter-Memorial ¶¶ 1, 152 (Dec. 7, 2020).

[14] *MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Amicus Curiae Submission (Mar. 30, 2021), ¶ 90.

[15] *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, U.N. Open-Ended Intergovernmental Working Grp. on Transnat'l Corps. and Other Bus. Enter. With Respect to Hum. Rts. (2021),

<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

(<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>).

[16] *Forced Labor*, U.S. Customs and Border Prot., <https://www.cbp.gov/trade/forced-labor> (<https://www.cbp.gov/trade/forced-labor>).

[17] *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China: Report to Congress*, U.S. Dept. Homeland Sec. (June 17, 2022), at 8, <https://www.dhs.gov/sites/default/files/2022->

06/22_0617_fletf_uflpa-strategy.pdf

(https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf).

[18] *Id.*

[19] *Id.* at v (“The UFLPA establishes a rebuttable presumption that goods mined, produced, or manufactured wholly or in part in Xinjiang or by an entity on the UFLPA Entity List are prohibited from U.S. importation under 19 U.S.C. § 1307.”).

[20] *Id.* at 19.

[21] Philip Blenkinsop, *EU Proposes Banning Products Made With Forced Labour*, Reuters (Sept. 14, 2022), **<https://www.reuters.com/markets/europe/eu-proposes-banning-products-made-with-forced-labour-2022-09-14/>**
(<https://www.reuters.com/markets/europe/eu-proposes-banning-products-made-with-forced-labour-2022-09-14/>).

[22] *See* Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16 2021,
<https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=71731FA3BE835852C39F24D5BEFF8C60.delivery1-replication?blob=publicationFile&v=2>
(<https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=71731FA3BE835852C39F24D5BEFF8C60.delivery1-replication?blob=publicationFile&v=2>).

[23] See *French Duty of Vigilance Law – English Translation*, Bus. and Hum. Rts. Res. Ctr. (Dec. 14, 2016), <https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/> (<https://www.business-humanrights.org/en/latest-news/french-duty-of-vigilance-law-english-translation/>).

[24] *Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains*, Eur. Comm'n (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 (https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145).

Professional Perspective

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Uyghur Forced Labor Prevention & Model Contract Clauses

Contributed by [Patrick Miller](#), P Miller Legal Services

Under the Uyghur Forced Labor Prevention Act (UFLPA), goods imported on or after June 21, 2022 are subject to the presumption that any aspect of their supply chain with a nexus to the Xinjiang region of China includes prohibited forced labor.

Goods produced using forced labor have been prohibited from importation into the US for nearly 100 years pursuant to Section 307 of the Tariff Act of 1930, as amended ([19 U.S.C. § 1307](#)). Nonetheless, slippage into US markets continues to occur despite the growing use of supplier codes of conduct and social audits in the supply chain. Some products entering the US stream of commerce are still tainted during one or more stage of production by forced or child labor.

Over the past few years, Customs & Border Protection (USCBP) has amplified its enforcement of Section 1307—which has led to an increasing number of goods being subject to withhold release orders (WROs) and turned back at port. There have even been some specific actions taken against goods produced in Xinjiang. The UFLPA represents the next step in this process.

Industry participants have voiced concerns that they lack tools to comply with the UFLPA's provisions. While fully compliant tools and processes are not yet in place, there are numerous tools currently available for multinationals to incorporate a human rights due diligence framework in their supply chains. Of particular relevance to legal professionals are the [Model Contract Clauses](#) (MCCs) developed by a working group of the American Bar Association Business Law Section. As noted by the [leaders of the working group](#), “The MCCs provide missing operational guidance for mapping, identifying, and addressing human rights risks at every tier of the supply chain.”

UFLPA Summary

The UFLPA was enacted on Dec. 23, 2021 and came into full force on June 21, 2022. Rulemaking and public conferences in the past six months culminated in a series of guidance documents issued by [USCBP](#) and the [Forced Labor Enforcement Task Force](#) (FLETF) on June 13 and 17, 2022, respectively. These documents outline how the US government plans to enforce the UFLPA and what companies should do to ensure their imports are not affected by these enforcement actions.

The UFLPA mandates a rebuttable presumption that any goods that have been produced, manufactured, or mined in whole, or partially, in Xinjiang have been made using forced labor, and are thus unable to enter the US by virtue of Section 1307. This rebuttable presumption also applies to goods that are made by certain entities which have been identified by the US government and specifically listed in the Federal Register; and can even apply to goods manufactured outside of Xinjiang if they've been produced by displaced Uyghurs.

The FLETF guidance states,

USCBP will implement an enforcement plan that identifies and interdicts goods from high-priority sectors that are found to have a nexus to production in Xinjiang, subsidiaries and affiliates of Xinjiang Production and Construction Corps, and any other producing entity found to utilize forced labor via a government-labor scheme.

The high-priority sectors identified are cotton, silica-based products (such as polysilicon, glass, etc), tomatoes, and apparel. This enforcement plan will likely include the use of USCBP's detention & exclusion authorities under [19 U.S.C. §1499](#) and its seizure authorities under [19 U.S.C. §1595a\(c\)](#).

Companies must ensure their supply chain practices conform with the UFLPA to avoid supply chain disruptions. There are two key issues to consider with respect to the UFLPA:

- Are the products within the scope of the UFLPA?
- If so, can your company demonstrate through clear and convincing evidence that the goods were not produced using forced labor?

Products Within UFLPA Scope

Products are within the scope of the UFLPA if they were produced in Xinjiang, any of their components were produced in Xinjiang, or produced by one of the entities listed as prohibited by the US government. The government has provided guidance for companies on how to demonstrate that their goods are not subject to the UFLPA. These include:

- Supply chain mapping (to ensure the company knows from where its products, and their constituent parts, are produced)
- Supply chain tracing (to ensure that the products and constituent parts in a particular shipment are produced in accordance with the supply chain map)
- Documentary evidence that supports the supply chain mapping and tracing

The documentation should include information concerning “how the imported good was made from raw materials to finished good, by what entities, and where, including all in-house manufacturing, sub-assembly operations, and outsourced production related to the imported good.” Even logistical activities are subject to the act, which means companies must also be cognizant as to how their goods (and constituent components) are transported.

Effective supply chain mapping allows the importer “to identify who is doing the work at each step of the process and the conditions under which the work is being done.” Effective supply chain tracing demonstrates the chain of custody of the goods throughout the supply chain map.

The FLETF guidance document also notes that “DNA traceability or isotopic testing” could be used, provided the company can establish its connection to the particular shipment.

The USCBP guidance also includes specific notes on supply chain documentation for cotton, polysilicon (a key constituent for solar panels), and tomatoes in Appendix A.

Addressing the Rebuttable Presumption

If your company has sufficient supply chain mapping, tracing, and documentation—but your goods include components with a nexus to Xinjiang or a listed entity—then you must provide clear and convincing evidence that such goods were not made using forced labor.

It appears likely that the evidence required will be rather burdensome and extensive, such that companies are, strongly considering not importing products with Xinjiang in their supply chain, if possible. The guidance document even notes that it may be difficult to obtain credible information on the production processes in this region.

However, not all companies will find feasible alternatives to sourcing their goods or inputs through Xinjiang. Furthermore, despite the presumption otherwise imposed under the UFLPA, it's not a foregone conclusion that every product made in the region is actually tainted by forced labor.

Companies that still must use products with a nexus to Xinjiang can request an exception to the rebuttable presumption, which requires that the importer: demonstrate it has complied with the guidance set out in Section VI of the FLETF guidance; respond completely and substantively to all USCBP requests for information; and demonstrate by clear and convincing evidence that its imports were not mined, produced, or manufactured wholly or in part with forced labor.

The evidence which the US government will consider based on the guidance documents includes:

- Effective supply chain tracing and mapping (see above)
- Human rights due diligence records
- Implementation of supply chain management measures

With respect to human rights due diligence, the FLETF guidance notes that the Department of Labor's [Comply Chain website](#) has detailed information on establishing an appropriate system, stating that while “systems may vary from industry to industry, an effective due diligence system in any industry may include the following elements”:

- Engage stakeholders and partners
- Assess risks and impacts
- Develop a code of conduct
- Communicate and train across supply chain
- Monitor compliance
- Remediate violations
- Independent review
- Report performance and engagement

Companies should not underestimate the degree of difficulty in obtaining reliable human rights due diligence information. As such, companies should carefully assess how they will implement a human rights due diligence program which is sufficient to rebut the presumption outlined in the UFLPA.

The FLETF guidance also lists several relevant supply chain management measures, including: carefully investigating your suppliers before entering into contracts, requiring contracts that allow for corrective action and/or consequences where forced labor is identified, and having access to information (documentation/personnel) to effectively audit & monitor suppliers' conduct. Effective contracting is a vital aspect of compliance with the UFLPA, particularly where products have a nexus in Xinjiang. The MCCs can assist lawyers to prepare supply contracts in accordance with these criteria.

MCC Toolkit Aid

The MCCs are a useful legal toolkit to aid in compliance with the UFLPA and help ensure your supply chain is not tainted by human rights abuses

The MCCs were produced by experienced commercial lawyers through a working group of the American Bar Association Business Law Section. They were designed as a practical tool to help buyers and suppliers protect the human rights of workers in international supply chains.

The FLETF guidance notes that “importers “may leverage U.S. government and NGO publications and other information to assist in implementing due diligence, effective supply-chain tracing, and supply-chain management measures”—and specifically references documents such as the United Nations Guiding Principles on Business & Human Rights and the OECD Guidelines for Multinational Enterprises. The MCCs were designed to be a resource to effectively operationalize the principles found in those ‘soft law’ documents, including the focus on human rights due diligence, remediation, and enforceable obligations.

As noted above, the FLETF guidance specifically identifies these as critical issues when describing an effective supply chain management system.

The MCCs were intended to be a modular set of template contract clauses that can be used for supply chain agreements between a buyer and every tier supplier in a wide variety of industries. The MCC toolkit also includes resources for companies to prepare a supplier code of conduct in conformance with their specific priorities—and even a responsible buyer code of conduct.

The MCC approach, which focuses on human rights due diligence and enforceable obligations, has a better prospect of ensuring against human rights abuses in supply chains than the previous practices of empty representations and warranties which are routinely breached and the accompanying supplier codes of conduct and social audits which have had the tendency to devolve into a “[tickbox](#)” [exercise](#) devoid of any substance.

The UFLPA guidance documents indicate at several instances that the steps taken by importers such as mapping, tracing, and due diligence must be effective and incorporate the latest best practices in responsible sourcing to demonstrate that products are outside the scope of the UFLPA and/or were not produced using forced labor.

Conclusion

The passage of the UFLPA is the continuation of a recent trend in several countries to prohibit products which they contend are tainted by human rights abuses from entering their consumer economies.

The UFLPA is limited in so far as it focuses on a narrow region of China, but it still covers a wide array of products, particularly with respect to the high priority sectors. For example, the FLTF guidance notes that silica “is a raw material that is used to make aluminum alloys, silicones, and polysilicon, which is then used in buildings, automobiles, petroleum, concrete, glass, ceramics, sealants, electronics, solar panels, and other goods”.

The prevailing theory is that the philosophy and assumptions that formed the basis of the UFLPA will spill over into further enforcement actions under Section 1307. Importers should take steps now to ensure that it can prove all their products are free of the taint of forced and child labor to avoid future disruptions in their supply chains.

Even if a company can demonstrate that its goods are not covered by the UFLPA, it will still be required to produce human rights due diligence documentation if its goods become subject to a WRO under Section 1307. Additionally, several other countries are requiring that multinationals of a certain size establish human rights due diligence regimes, consumers are becoming increasingly concerned with how their goods have been produced, and investors are increasingly attentive to the “S” in evaluating ESG factors.

These legal & market trends are making practices like human rights due diligence and supply chain mapping a requirement for importers—rather than a voluntary exercise in corporate social responsibility.

A full-picture human rights due diligence map may seem like an insurmountable task given the intricate web of suppliers in the international value chain. However, companies can dramatically reduce their chances of entanglement with human rights abuses by performing a risk-based analysis of their supply chain and focusing on the highest risk areas first. This is in keeping with best practices in business and human rights and can prove to be an excellent tool for risk mitigation and responsible sourcing.

Although many industry participants have voiced concerns over compliance with the UFLPA and other similar laws, companies can use existing tools like the MCCs to help establish an effective contractual framework to protect worker rights. Effective contract clauses are a useful first step to establishing a stable—and responsible—international supply chain.



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