CHAPTER 13

NEW LAWS TO COMBAT TRAFFICKING IN PERSONS

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I. INTRODUCTION

Those who practice in the international enforcement sphere are all too familiar with perennial compliance and enforcement "hot topics" such as the U.S. Foreign Corrupt Practices Act, the U.S. Travel Act, the U.K. Bribery Act, and carbon copy prosecutions. Perhaps less familiar, but increasingly demanding serious compliance attention and resources, is the emerging area of human anti-trafficking and forced labor laws and regulations as they relate to business supply chains. These mandates include the California Transparency in Supply Chains Act, the Executive Order on Strengthening Protections Against Trafficking in Persons in Federal Contracts, and the U.K. Modern Slavery Act of 2015. By enlisting or conscripting companies into the fight against human trafficking, child labor, and other "forced" or "coerced" labor practices, these laws introduce a wholly new compliance reality requiring accountability and supply chain compliance.

Today's companies – especially those that interface with, or rely on, overseas markets as part of their supply chains (and, these days, those are most) – must understand and prevent the myriad of problems flowing from such labor issues. The costs for paying insufficient attention to these issues can include lawsuits (class-action and otherwise), enforcement actions, prosecutions/investigations, activist pressures, and brand-damaging negative media and other forms of publicity.

This chapter surveys today's trafficked/child/slave/indentured labor (collectively, "coerced" or "forced" labor) laws. By way of summary, the new – and increasingly important – "Big Three" forced labor regimes every attorney advising contemporary trans-national businesses (whether in-house or as outside counsel) must understand are: (1) the Federal Acquisition Regulation ("FAR"") anti-trafficking provisions; (2) the California Transparency in Supply Chains Act; and (3) the U.K. Modern Slavery Act of 2015. This chapter also includes a discussion of the Trade Facilitation and Trade Enforcement Act of 2015, which entered into effect in March 2016.

II. THE FEDERAL ACQUISITION REGULATIONS ANTI-TRAFFICKING PROVISIONS

The U.S. Government is the world's largest consumer of goods and services. As a result, its sheer buying power and leverage as an acquirer of goods and services puts it in the position of being able to change – or at least try to change – behavior, especially corporate behavior. It is no overstatement that the new FAR provisions relating to anti-trafficking have had an immediate and significant impact on the 300,000 or so direct

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suppliers (as well as countless sub- and sub-subcontractors/vendors) that do business with the U.S. government.

Moving from the general to the specific, in September 2012, President Obama signed an Executive Order on "Strengthening Protections Against Trafficking in Persons in Federal Contracts."[1] The final rule implemented by that Executive Order was published on January 29, 2015, and became effective on March 2, 2015.[2]

As of March 2015, implementation of that Executive Order applied to all government contractors (no *de minimus* exceptions).[3] The final FAR anti-trafficking provisions mandate that *all* federal contractors ensure that their supply chains are in no way tainted by trafficked labor. This subset of requirements also applies irrespective of contract type or contract value. In this regard:

- *Prohibited conduct*. The key items of prohibited conduct are found at FAR 52.222-50(b),[4] which provides the prohibition that contractors, contractor employees, and agents may not:

    1. ***Engage*** in severe forms of trafficking in persons during the period of performance of the contract;
    2. ***Procure*** commercial sex acts during the period of performance of the contract;[5]
    3. ***Use*** forced labor in the performance of the contract;
    4. ***Destroy, conceal, confiscate or otherwise deny access*** by an employee to the employee's identity or immigration documents, such as passports or driver's licenses;
    5. ***Use misleading or fraudulent practices*** during the recruitment of employees or offering of employment (a number of examples are provided here); or use recruiters that do not comply with local labor laws of the county in which the recruiting takes place;
    6. ***Charge*** employees recruitment fees;
    7. ***Fail to provide return transportation*** to pay for the costs of return transportation upon the end of employment (a number of exceptions may apply);
    8. ***Provide or arrange housing*** that fails to meet the host county housing and safety standards; or

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[1] Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).
[2] *Id.*
[3] *Federal Acquisition Regulation; Ending Trafficking in Persons,* 80 Fed. Reg. 4967 (Jan. 29, 2015).
[4] *Id.* at 4990.
[5] Although the rule is clear, the scope of the rule remains unclear. Are prime contractors now required to monitor the on- and off-hour conduct of sub- and sub-sub employees when it comes to commercial sex acts? What is actually expected of prime contractors and their subcontractors when it comes to this rule? Our best estimation is that the drafters of the rule recognize that the answers to these questions are not found explicitly in the rule's text, and as such, that they will must provide additional guidance to the business community on what is actually expected.

9. ***If required by law or contract, fail to provide an employment contract***, recruitment agreement, or other required work document in writing. (A number of more detailed requirements apply).[6]

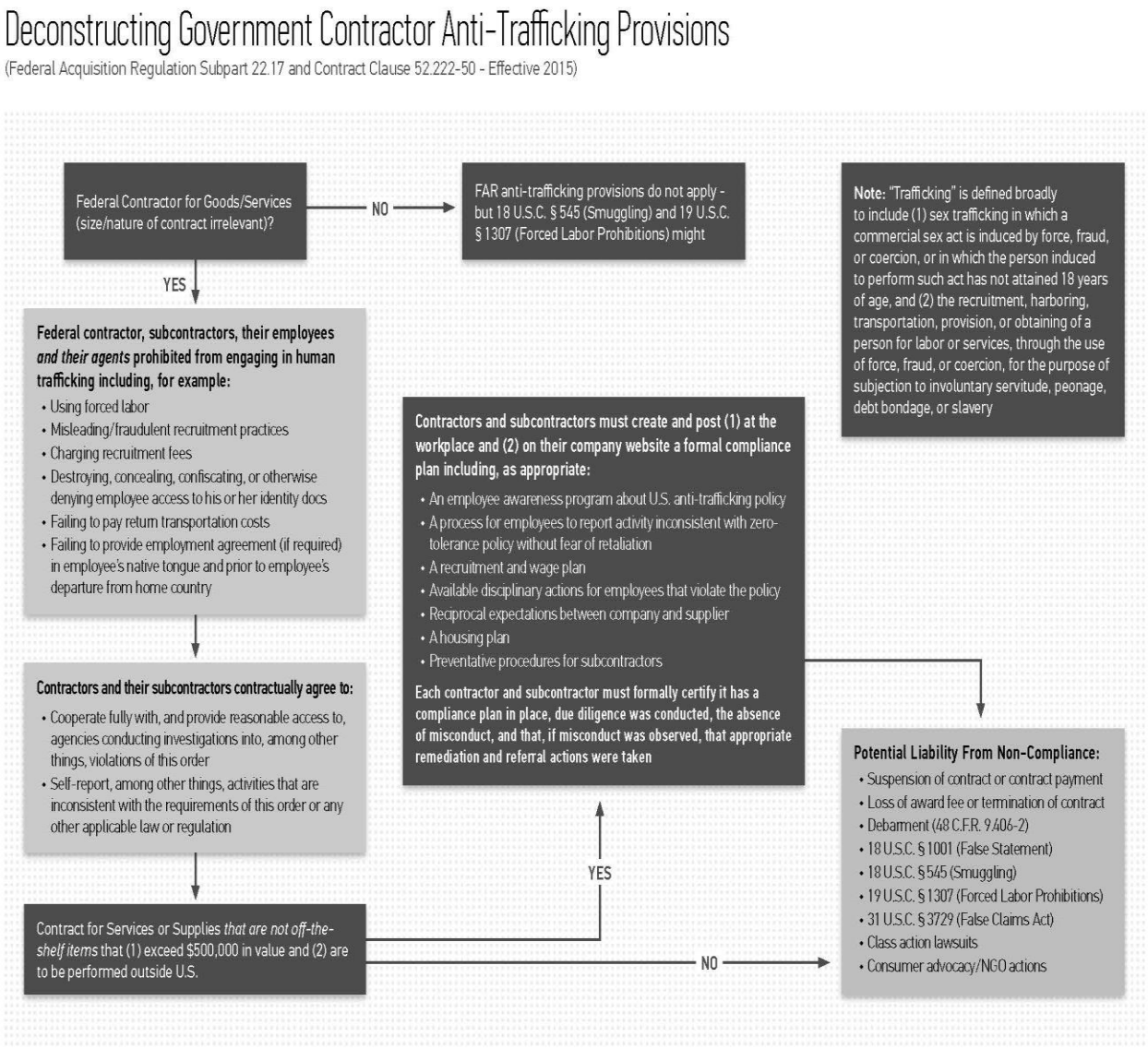
Also relatively clear are several requirements found at FAR 52.222-50(c)-(e), "Contractor requirements," "Notification," and "Remedies."[7] These requirements include:

- ***Disclosures to all employees***: Contractors and subcontractors must notify their employees and agents of the U.S. Government's policy prohibiting trafficking in persons and of actions that will be taken against employees or agents who violate the policy. "Such actions for employees may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment."[8]
- ***Actions against employees***: Contractors must "[t]ake appropriate action, up to and including termination, against employees, agents, or subcontractors" that engage in the prohibited conduct contained in subparagraph (b).[9]
- ***Immediate Notification Regarding Violations***: Contractors must inform the Contracting Officer and Inspector General immediately of "[a]ny credible information it receives from any source . . . that alleges a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates the policy in paragraph (b) of this clause . . . ."[10] In addition, the contractor must provide information concerning "[a]ny actions taken against a Contractor employee, subcontractor, subcontractor employee, or their agent pursuant to this clause."[11]
- ***Remedies***. The Government's remedies for noncompliance are also relatively clear. Noncompliance can result in:
    1. Requiring the contractor to remove a contractor employee (or employees) from the performance of the contract;
    2. Requiring the contractor to terminate a subcontract;
    3. Suspension of contract payments;
    4. Loss of an award fee;
    5. Declination to exercise available options under the contract;
    6. Termination of the contract for default or cause; and
    7. Suspension or debarment.[12]

This is a non-exhaustive list of potential government remedies. Contractors must also consider the risk of False Claims Act liability, class actions, consumer boycotts, and

[6] 80 Fed. Reg. at 4990-91.
[7] *Id.* at 4991.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

possible criminal prosecution for fraud or false statements and certifications, such as criminal prosecutions under 18 U.S.C § 1001 (false statements).



Compliance Plan, Certification Requirements, and Due Diligence

In addition to the requirements that apply to all contracts regardless of dollar value, there are other requirements, for certifications regarding compliance plans and due diligence, that apply above certain thresholds. Section 52.222-50(h)— Compliance plan— provides that the regulation will apply to any portion of the contract that: (i) is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and (ii) has an estimated value over $500,000.

The clause requires that, "annually after receiving an award," a contractor will provide the contracting officer a certification that it has implemented a compliance plan. A

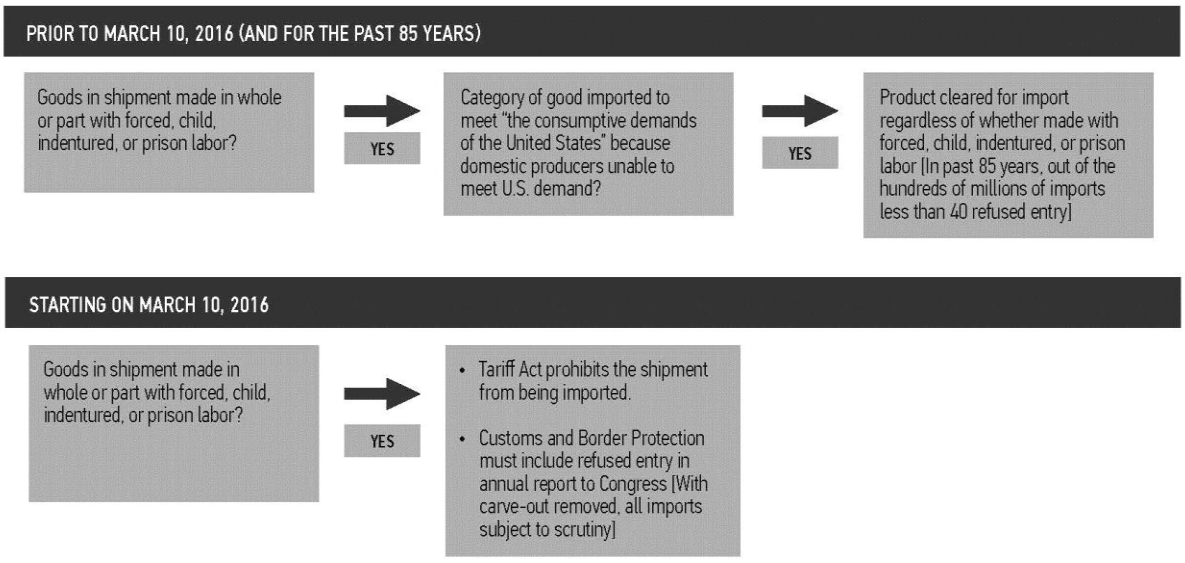
contractor must also certify that, after having conducted due diligence, either: (a) To the best of the Contractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents is engaged in any such activities; or (b) if abuses relating to any of the prohibited activities have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

The relevant FAR provisions do not end with the above. Contractors must also (and, rather exceptionally) (1) affirmatively *cooperate with*, and *provide access to*, enforcement agencies investigating compliance with forced-labor laws; and (2) make a mandatory disclosure (or self-report) of potential anti-trafficking violations upon receipt of any credible information from any source that alleges a contractor employee, subcontractor, or subcontractor employee has engaged in conduct that violates the new FAR provisions.[13] As experienced practitioners will recognize, mandatory disclosure and required cooperation are no small matters and require immediate action in cases of even *potential* non-compliance.

The new FAR provisions notably raise the bar by requiring companies to ensure their entire supply chain is free from human trafficking and forced labor. Ensuring compliance, in turn, will require considerable resources.

III. IMPORTS FACE NEW LEVEL OF SCRUTINY: CLOSING THE TARIFF ACT OF 1930'S LOOPHOLE WITH THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015

The federal government took a significant step in February 2016 in the fight against slave, trafficked, child, and indentured labor. President Barack Obama signed into law the "Trade Facilitation and Trade Enforcement Act of 2015."[14] This enactment, signed on February 22, 2016 and entered into effect on March 10, 2016, critically closed a loophole by amending the Tariff Act of 1930 to remove the long-standing "immunity" for broad classes of goods made with forced and prison labor.



[13] *Id.*
[14] Pub. L. No. 114-125 (2016).

The Tariff Act was passed in 1930. Since that time, the United States has made it illegal to import any goods made with forced or prison labor. However, a controversial key carve-out provided that certain goods from abroad that met "the consumptive demands of the United States" were exempt from the ban. So, for example, because the demand for cocoa or teak far outstripped any domestic supply (after all, there is none), cocoa and teak imports were never stopped regardless of how the cocoa or teak was harvested or produced.

The impact of the carve-out is far more than academic. U.S. Customs and Border Protection ("CBP") and its predecessor agencies reported less than 40 instances in the last 85 years of stopping shipments of goods suspected to have been made with forced or prison labor. Given that forced and prison labor is commonplace in many parts of the world, this low number speaks to the carve-out's real-world impact. With the carve-out a thing of the past, every indication is that scrutiny of imports, and the corresponding number stopped shipments, is likely to increase significantly.

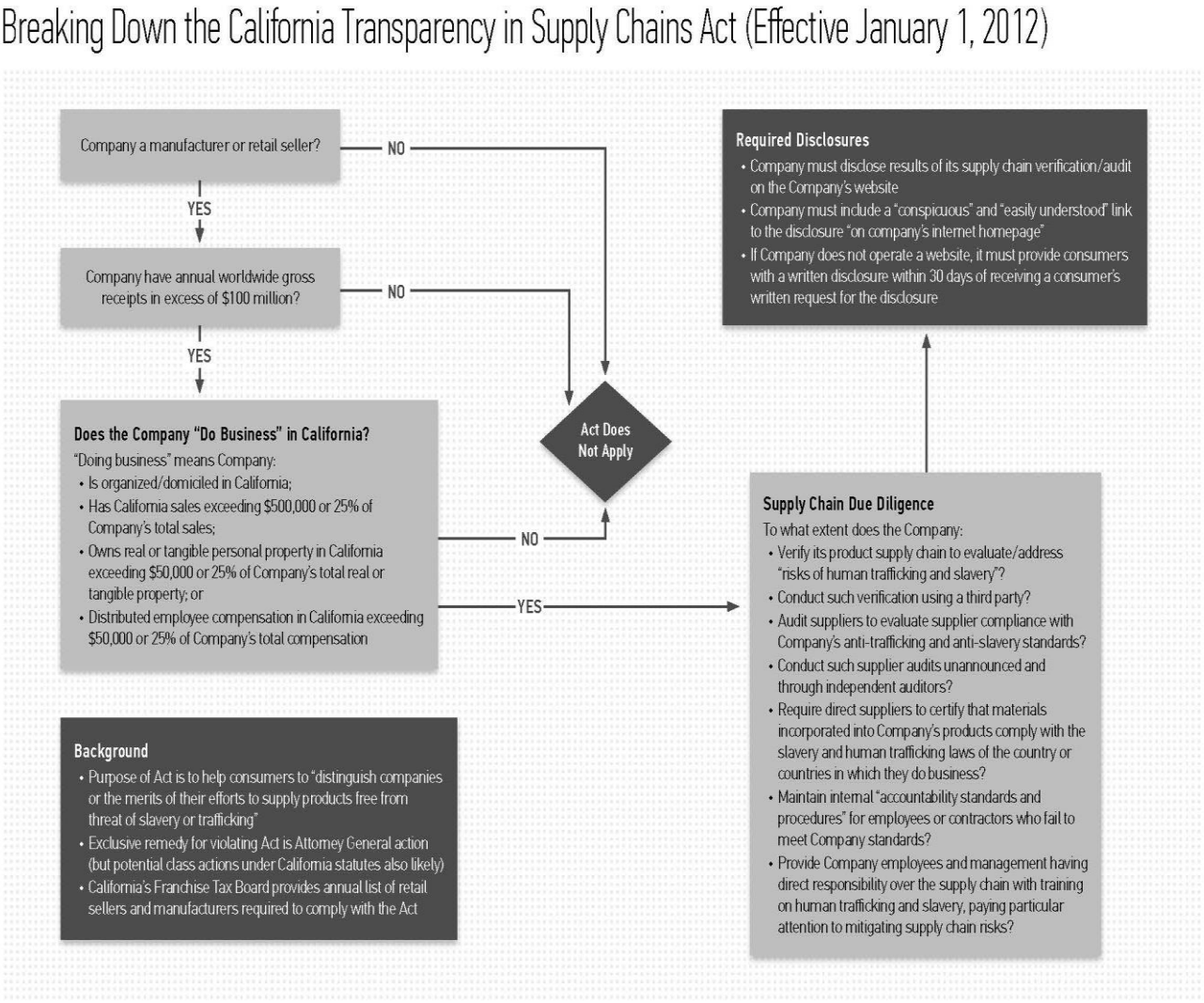
In terms of specific enforcement mechanisms, as of this writing there is no concrete plan. We assume that the first "wave" of enforcement will not come in the form of "random shipments inspections" (after all, how does a random inspection of goods at a U.S. port reveal whether that good was made with forced labor). Instead, if enforcement of the Foreign Corrupt Practices Act is to be a guide, we anticipate that business competitors, non-governmental organizations, disgruntled current or former employees, and activist groups can be expected to provide substantiated/evidence-supported "tips" to CBP concerning specific shipments of specific goods sent by specific manufacturers or through specific importers. Such targeted whistleblower complaints are the most likely source of successful enforcement actions.

IV. CALIFORNIA'S APPROACH TO ERADICATE SLAVERY AND HUMAN TRAFFICKING BY REGULATING THE "DIRECT SUPPLY CHAIN"

In response to increasingly vocal consumer calls for information about what products are made with forced labor, in 2011 the California legislature passed the California Transparency in Supply Chains Act of 2010 (S.B. 657).[15] The Act requires qualifying companies (and there are more than 3,200 of them) to disclose publicly the precise nature and scope of their efforts to eradicate human trafficking, slavery, child labor, and other forms of forced labor from their worldwide supply chains.

Although California's disclosure regime is now mandatory, compliance with the California act has lagged (though early indications are that 2016 and beyond will see enforcement ramping up). This shortfall in compliance is animating advocacy groups to devise "naming and shaming" campaigns targeting those who ignore the California Act's disclosure requirements or whose disclosures are incomplete or, worse, inaccurate.

[15] CAL. CIV. CODE § 1714.43.



The arrival of such negative PR-generating, revenue-harming activism is intended to swiftly move corporate compliance from an item on the "to do" list to a "to do right now" business imperative. Even more, the fact that 2015 witnessed a slew of federal class actions in California alleging violations of state consumer protection laws because of "false claims" made about "clean supply chains" has only accelerate this dynamic.[16]

[16] September and November 2015 saw a number of class action lawsuits based on theories (first aired in the UK Guardian newspaper) that companies' mandatory ("human-trafficking-free") disclosures under the California Transparency in Supply Chains Act were incomplete and/or inaccurate. The suits were premised on the claim that, contrary to company assertions, (1) there in fact was trafficked/forced labor in the company supply chains; and (2) had the class action plaintiffs/consumer known that the disclosures were false and misleading, they would have never purchased the product. On December 9, 2015, U.S. District Judge Cormac J. Carney in *Barber v. Nestle USA, Inc.* dismissed the plaintiffs' claims. As relevant here, Judge Carney ruled that the complained-about public statements concerning company compliance efforts were merely "aspirational," and, therefore, did not "mislead" consumers. Judge Carney also held that plaintiffs inappropriately asked companies to engage in certain affirmative conduct, rather than simply reporting that steps they have taken, as required by the California Act. This violated the Safe Harbor Doctrine (a similar argument could hold here - at least in the

For those subject to the 2010 California "Transparency in Supply Chains Act," the law requires special attention from compliance officers. The California law applies to all (1) retailers and manufacturers (2) doing business[17] in California with (3) worldwide gross receipts over $100 million.[18] Those falling under its jurisdiction must answer a series of questions designed to reveal what, if anything, they are doing to ensure that their supply chains/products are free from the taint of human trafficking and other forms of forced labor. Specifically, they must answer what they are doing to:

- **audit** suppliers to evaluate supplier compliance with anti-trafficking and anti-slavery standards and regulations?;
- evaluate their product supply chains for risks of human trafficking and slavery (does the company use third-party auditors to conduct the evaluations)?;
- **conduct** such supplier audits unannounced and through independent auditors?;
- **require** direct suppliers to certify that materials incorporated into the company's products comply with the slavery and human trafficking laws of the country or countries in which they do business?;
- **maintain** internal accountability standards and procedures for employees or contractors who fail to meet company standards?; and
- **train** employees and management with direct responsibility over the supply chain regarding human trafficking and slavery?

Those companies falling under the California Act's jurisdictions must: (1) disclose their answers to the foregoing; and (2) must do so with a link on the homepage of the company's website. Although some say that this is a "mere" disclosure-only statute (true) that does not force companies to take any particular anti-trafficking action (technically true, but practically incorrect), such a view is short-sighted and does not recognize the realities in today's companies. Very few companies will be comfortable announcing "we are doing nothing" in their disclosure; instead, companies, realizing the questions, tend to put into place the asked-about activities/processes/trainings outlines so that they, in their disclosures, can accurately state that they are taking various steps to combat trafficking in their supply chains.

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context of the mandatory SEC disclosures). More specifically, plaintiffs claimed they were entitled to be informed of the "likelihood" that coerced labor tainted the products they purchased, whereas the California Act merely required companies to inform consumers of the steps the companies took to reduce the chances of such taint. Of course, to the extent a company issues statements stating facts ("we are 100% slave free"; "we have a zero-tolerance policy towards forced and child labor"; etc.) rather than aspirations, being on the wrong side of a class action continues to be a very real danger unless the declarations are carefully drafted (not to mention factually founded).

[17] "Doing business" in California means:

- Organized or domiciled in California;
- Sales in California exceeding $500,000 or 25 percent of total sales;
- Owns real estate or tangible personal property in California exceeding $50,000 or 25 percent of total real or tangible property; or
- Distributes employee compensation in California exceeding $50,000 or 25 percent of total compensation.

[18] CAL. CIV. CODE § 1714.43(a)(1).

V. THE UK MODERN SLAVERY ACT OF 2015 APPLIES TO COMPANIES DOING "ANY BUSINESS" IN THE UNITED KINGDOM

Multi-national companies with business interests in the United Kingdom are now subject to another anti-trafficking regime by virtue of the U.K.'s efforts to fight against global human trafficking. On the heels of the U.K. Bribery Act of 2010 (a close analog of the U.S. Foreign Corrupt Practices Act, but extending even further), the U.K. Government has now borrowed significantly from the California Transparency in Supply Chains Act to impose its own disclosure framework.

The U.K. Modern Slavery Act (the "U.K. Act"), passed by Parliament in 2015,[19] will require certain businesses to make a slavery and human trafficking disclosure statement on their websites. The reporting obligation applies to financial years starting on or after the 1st of April 2016. Businesses with an annual turnover of 36 million British pounds (£36M) will be subject to the reporting requirements of the UK Act. The UK Act became law this past May—setting forth certain attributes that would require companies to report—but deferred determining the annual turnover threshold, which is the annual revenue a business receives for its goods or services.

Those familiar with the California Act will recognize many of the U.K. Act's requirements. However, there are differences. Most notable, perhaps, is the U.K. Act's broader jurisdictional requirements. The U.K. Act's disclosure requirements extend to any company that:

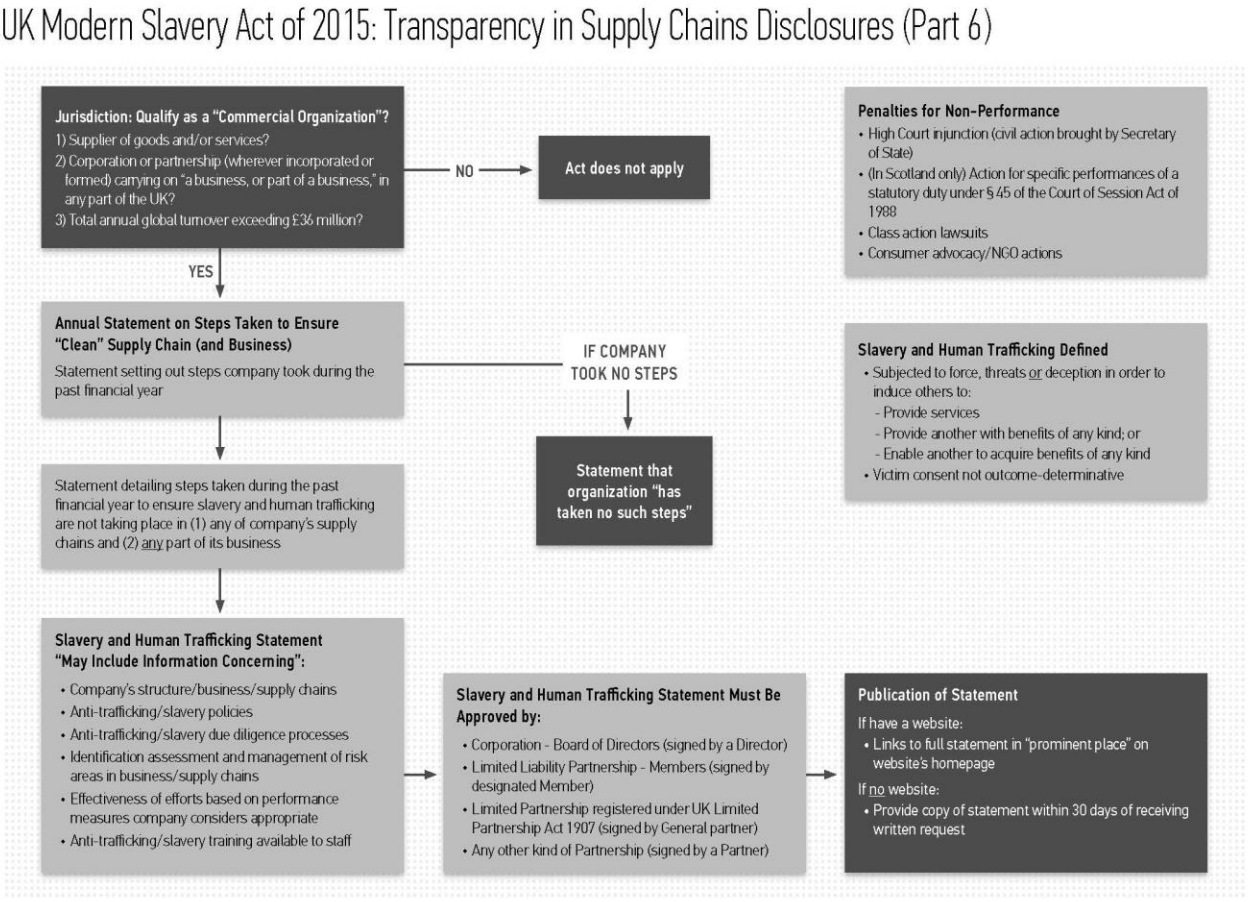
1. Carries on a business, or part of a business, in any part of the United Kingdom;
2. Has a total turnover of no less than an amount to be determined by the U.K. Secretary of State; and
3. Supplies goods or services (in contrast to the California Act, which applies only to companies that are either a retail seller or manufacturer).

Additionally, unlike the California Act, which requires companies to expressly address a list of subject areas, the Modern Slavery Act Act merely provides a non-exhaustive list of suggested disclosure subjects.

Significantly, the Modern Slavery Act broadens the criteria on which businesses will be governed as set forth by the California Act. The Modern Slavery Act's disclosure requirements extend to any company that meets all of the following criteria:

- Carries on a business, or part of a business, in any part of the United Kingdom;
- Has a total turnover of no less than £36 (compared to the California Act's $100 million criteria); and
- Supplies goods or services (which stands in contrast to the California Act and its application only to companies that are either a retail seller or manufacturer).

[19] Modern Slavery Act, 2015 Ch. 30, available at http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf



In perhaps one of the most notable departures from the California Act, which requires companies to expressly address *specific* subject areas, the U.K. Modern Slavery Act Act merely provides that each fiscal year, a covered company must make a disclosure statement setting forth what it has done to ensure that trafficking is not taking place in its business or supply chain (leaving it up to the company to determine what areas to highlight/discuss). Alternatively, the company can make a statement that it has taken no such steps. But in any event, it is critical that, as with the California Act, the disclosure must be 100% accurate, neither overstating nor understating the company's actual activities.

What is a "Slavery and Human Trafficking Statement"?

Each fiscal year (ending on or after March 31, 2016), a covered company must make a statement setting forth what it has done to ensure that trafficking is not taking place in its business or supply chain (a "disclosure statement"). Alternatively, the company can make a statement that it has taken no such steps. The disclosure statement can, but does not have to include:

- the organization's structure, its business and its supply chains;
- its policies in relation to slavery and human trafficking;

- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- the parts of its business and supply chains where there are risks of slavery and human trafficking taking place, and the steps it has taken to assess and manage those risks;
- its effectiveness in ensuring that slavery and human trafficking are not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- the training about slavery and human trafficking available to its staff.

Who Must Approve the Disclosure Statement?

The UK Act attempts to promote accountability by requiring the disclosure statement be approved and signed in a specific manner. That is, corporations must have the disclosure statement approved by the board of directors and signed by a director; limited liability partnerships must get member approval and signature by a designated member; limited partnerships must get general partner's signature; and any other partnership must get a partner's signature.

Where should the Disclosure Statement be made?

Closely aligned with the California Act, the U.K. Modern Slavery Act requires that any company with a website (1) to publish the entire Disclosure Statement on its website, and (2) have a link to the Disclosure Statement in a prominent place on the website homepage. In the unlikely chance that a qualifying company has no website, it must provide its Disclosure Statement to a requesting party within 30 days of receiving a written request.

What if a company fails to include the required Disclosure Statement?

The U.K. Secretary of State may bring civil proceedings in the High Court for an injunction if a company violates the U.K. Act's disclosure requirements. In Scotland, a proceeding may be brought for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.

Penalties for Failure to Disclose or for Inaccurate Disclosure as well as Compliance Program Guidelines

Under the Modern Slavery Act, the U.K. Secretary of State may bring civil proceedings in the High Court of Justice for an injunction if a company violates the U.K. Act's disclosure requirements. In Scotland, a proceeding may be brought for specific performance of a statutory duty under section 45 of the Court of Session Act 1988. Of course, civil litigation brought by shareholders, advocacy groups, consumer groups, etc. that focus on alleged inaccurate, incomplete or misleading reporting of a company's efforts is, as has been the case with the California Act, in many ways one of the most concerning potential "penalties" facing companies under the U.K. Act.

VI. COMPLIANCE PROGRAM GUIDELINES

This section provides some basic guidelines for those just getting started (or fine-tuning) a company's existing policies:

A. ***Introduce and Enforce Meaningful Policies*** (or add policy language) focused on identifying and eliminating risks emanating from the various forms of coerced/forced labor within a business's supply chains. Among other places, such internally-consistent policies or policy language should be included in: (1) Codes of Conduct; (2) Annual Compliance Certifications; (3) Standard Contract Language; (4) Due Diligence Questionnaires; and (5) Supplier Statements of Conformity.

B. ***Adopt Standard Contract Language*** should include language addressing, among other key areas:

- Indemnification;
- Audit rights;
- Requirement of full cooperation in the case of any internal investigation or review;
- Requirement of immediate notification in the case of actual or potential non-performance/problems;
- Right to, as needed, contact the relevant authorities in the case of violation; and
- Consent to follow company-developed action-plan in case of any instances of non-compliance.

C. **Design a Risk-Based Labor Verification/Audit**

Program to evaluate and address risks of coerced and child labor in the company's supply chains, including:

- designing features tailored to reduce, control, and eliminate those risks;
- identifying the greatest risks existing within the supply chain;
- deciding whether to employ independent third parties to conduct these verifications/audits;
- considering including in the verification process consultations with independent unions, workers' associations, or workers within the workplace; and
- ensuring that supplier audits evaluate supplier compliance with company standards for eliminating coerced and child labor issues

D. **Require Appropriate Certifications**

Suppliers in the Supply Chain Should Certify that, in addition to the above, materials incorporated into products comply with (1) the company's code of conduct, and (2) the laws against coerced and child labor in the country or countries in which they are doing business. Key substantive provisions should include representations and warranties that a supplier:

- ***Complies*** with all applicable national and international laws and regulations, as well as the company's code of conduct, including prohibition and eradication of coerced and child labor in its facilities, and that it requires its suppliers, including labor brokers and agencies, to do the same.

- ***Treats*** its workers with dignity and respect, provides them with a safe work environment, and ensures that the work environment is in compliance with applicable environmental, labor and employment laws, and your code of conduct.

- ***Refrains*** from corrupt practices, and does not engage in human rights violations.

- ***Certifies*** that it has not, and will not, directly or indirectly, engage in certain activities connected to coerced and child labor. These activities should be expressly detailed in the certification.

E. ***Design a Risk-Based Labor Verification/Audit Program*** to evaluate and address risks of coerced and child labor in your company's supply chains, including:

- ***Identify*** the greatest risks existing within the supply chain;

- ***Design*** measures tailored to reduce, control, and eliminate those risks;

- ***Decide*** whether to employ independent third parties to conduct these verifications/audits;

- ***Consider*** folding into the verification process consultations with independent unions, workers' associations, or workers within the workplace;

- ***Ensure*** that audits of suppliers evaluate supplier compliance with company standards for eliminating coerced and child labor.

F. ***Develop and Publicize Internal Accountability Standards***, including those related to supply chain management and procurement systems, and procedures for employees and contractors regarding coerced and child labor. Make sure you have procedures in place for employees and contractors who fail to meet these standards.

G. ***Assess Supply Chain Management and Procurement Systems*** of suppliers in the companies' supply chains to verify whether those suppliers have appropriate systems to identify risks of coerced and child labor within their own supply chains.

H. ***Train Employees and Business Partners***, particularly those with direct responsibility for supply chain management, on the company's expectations as they relate to coerced and child labor, particularly with respect to mitigating risks within the supply chains of products.

I. ***Guarantee that Remediation is Provided*** for those who have been identified as victims of coerced and child labor.

CONCLUSION

The fight against human trafficking has without question entered a new phase. Over time our summary of legal requirements will surely expand, both substantively and geographically, as consumers and governments come to expect that companies will "do their part" to ensure that their supply chains and, ultimately, their products, are free from the taint of human trafficking and other forms of forced or coerced labor.