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## WHITE PAPER

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### Companies to Navigate Complex and Changing Requirements Focused on Combatting Forced Labor in Supply Chains

In recent months, a wide variety of forced labor issues have caught the attention of legislators, regulators, the media, and the public. The press is also attuned to the issue of forced labor and the use of child labor in the United States. Realizing the complexity and importance of supply chains, consumers and lawmakers are beginning to focus on this issue. Regulators, too, are likely to exercise close scrutiny over supply chain and procurement operations with an eye towards combatting forced labor. Meanwhile, the reach of federal anti-trafficking law remains broad and undefined, while state legislatures create confusion with contradictory rollbacks of child labor protections. With this in mind, all entities will have to remain aware of the increasingly complex web of statutory, regulatory, and reputational risk. Corporations should consider addressing these issues in their compliance and risk mitigation procedures. Additionally, working with counsel can help reduce and address these issues as the legal landscape continues to change.

## SUPPLY CHAIN ETHICS ARE INCREASINGLY THE SUBJECT OF PUBLIC, MEDIA, AND GOVERNMENT SCRUTINY

In recent months, a wide variety of forced labor issues have caught the attention of legislators, regulators, the media, and the public. U.S. Lawmakers from both sides of the aisle united around the issue when they passed the Uyghur Forced Labor Prevention Act in 2021, partially as a response to pandemic-era supply chain challenges.<sup>1</sup> This was also a response to reports of forcible detention of the Uyghur people, a Chinese Muslim minority, and apparent pervasive use of Uyghur forced labor in the Xinjiang region of China.<sup>2</sup> The Act uniquely establishes a rebuttable presumption that goods produced in the Xinjiang region were produced using forced labor.<sup>3</sup> Such goods are prohibited from entering the United States.<sup>4</sup> The passage of the Act was a rare feat of bipartisan compromise and signals possible broad support for future legislative efforts to combat forced labor for goods and services for U.S. consumers.

The press is also attuned to the issue of forced labor and the use of child labor in the United States. Earlier this year, a *New York Times* investigation revealed the widespread use of migrant child labor in the supply chains of household-name food producers.<sup>5</sup> The widely circulated report stated that children, most of whom had entered the country as unaccompanied minors, were working in factories that produce supermarket staples.<sup>6</sup> These children were generally hired by staffing agencies, rather than by the companies directly.<sup>7</sup> In response, the Biden administration announced plans to crack down on migrant child labor.<sup>8</sup> In addition to new executive actions, companies with child labor in their supply chains may face liability under existing federal law: Child labor often constitutes “forced labor” under U.S. anti-trafficking laws, including the Trafficking Victims Protection Reauthorization Act (“TVPPRA”) (discussed in more detail below).<sup>9</sup>

The COVID-19 pandemic exacerbated existing issues in supply chain management. Shortages of both labor and goods put pressure on supply chains already at risk of forced labor.<sup>10</sup> Supply chains for consumer goods experienced significant distress as factories and ports were paralyzed by COVID cases. This was particularly acute in industries related to pandemic response; federal officials noted issues throughout supply chains for face masks, disposable latex and synthetic gloves, and sugarcane, and recognized the heightened risk of exploitative labor practices resulting from increased demand

for these products.<sup>11</sup> Realizing the complexity and importance of supply chains, consumers and lawmakers are intensifying their focus on this issue.

The Executive Branch has exhibited renewed interest in the issue: Customs and Border Patrol (“CBP”) has begun to issue Withhold Release Orders to prohibit the importation of products suspected to be produced using forced labor. The Biden administration also issued a 2021 [National Strategy for a Resilient Public Health Supply Chain](#), and in 2023, established a Joint Forced Labor Working group to “develop tools and resources to assist the health care and public health...sector with preventing, identifying, and addressing forced labor in their supply chains.”<sup>12</sup> Regulators are likely to exercise close scrutiny over supply chain and procurement operations with an eye towards combatting forced labor.

## THERE IS A SHIFTING LEGAL LANDSCAPE FOR HOLDING PRODUCERS OF GOODS AND SERVICES LIABLE FOR FORCED LABOR IN THEIR SUPPLY CHAINS

The TVPPRA creates a civil cause of action against individuals and companies that financially benefit from activities they knew or, importantly, *should have known* are linked to human trafficking.<sup>13</sup> A recent Supreme Court decision, *Nestle v. Doe*,<sup>14</sup> largely foreclosed alternative avenues of relief for foreign plaintiffs against U.S.-based companies, which in turn impacted how victims of human trafficking overseas are likely to bring civil restitution claims. The precise contours of the law have yet to be fully tested in the courts, particularly the standard by which a company’s “knowledge” is assessed. To what degree—and under what facts—a company is “aware of” and can be held liable for the actions of its contractors and suppliers who may operate in foreign countries is, as of yet, not fully answered across jurisdictions. Corporations that operate across states and countries now are left to address heightened risk with little insight into the precise operation of the law.

Individuals who work at corporations are not immediately shielded from the fact-specific review. Executives, employees, and others who “knowingly benefit” from any human trafficking venture may, similarly, be liable under these statutes. Additionally, directors of a company may be held personally liable through shareholder derivative suits to the extent they

breach their fiduciary duty to the corporation by failing to prevent corporate violations of anti-trafficking law.

With intensifying demands from regulators, investors, and the public for attention to environmental, social, and governance (“ESG”) issues, companies are increasingly focused on ESG considerations and initiatives. As more companies implement ESG initiatives, they may make commitments to adhere to certain ethical standards or make certain disclosures relating to ESG issues, including the ethical treatment of their labor forces. If a company is aware of forced labor or human trafficking risks, and—subsequently—fails to provide accurate detail or provides inaccurate details of that risk in public disclosures, including SEC disclosures, the company may face inquiries by the SEC and/or shareholders.

There are also new international trends, restrictions and guidelines that should be of particular concern to companies operating in multiple jurisdictions: There is a recent trend under UK law, for example, for plaintiffs to bring claims based on the tortious principle that a defendant can be liable to the extent it “negligently causes or permits to be created a source danger” and it is reasonably foreseeable that third parties may suffer harm as a result. Plaintiffs are seeking to apply that doctrine in relation to forced labor, asserting defendant companies created the source of danger, and that it was reasonably foreseeable that third parties (i.e., those in forced labor) may suffer as a result of it.<sup>15</sup>

In early 2022, the European Commission adopted a proposal for a directive on corporate sustainability due diligence.<sup>16</sup> The proposal, if implemented as drafted, would require companies to prevent, reduce, or eliminate any adverse impacts of their activities on human rights, including in the areas of child labor and the exploitation of workers.<sup>17</sup> National governments would set financial penalties for violations, and victims could sue for compensation even if the harm occurred outside the European Union.<sup>18</sup> Multinational corporations may be required to comply with all of the above domestic and international standards, depending on the specifics of their operations.

### **SOME U.S. JURISDICTIONS ARE CONSIDERING LOOSENING THEIR CHILD LABOR LAWS**

Iowa’s Senate recently advanced a bill that would, among other things, allow children as young as 14 to work more hours, later in to the night, and in new and more dangerous work environments.<sup>19</sup> Arkansas governor Sarah Huckabee Sanders recently

signed a bill into law that waives a work permit requirement for teens under age 16.<sup>20</sup> States like Minnesota and Missouri are considering similar changes to their laws.<sup>21</sup> Federal officials warn that laws like this may conflict with the federal Fair Labor Standards Act.<sup>22</sup> Proponents argue that rolling back child labor laws will provide greater job opportunities for teens and create some flexibility for employers in a tight labor market. Against the backdrop of the Biden administration’s new efforts to combat exploitative child labor, these actions send mixed messages to companies trying to comply with the law in good faith, particularly with their domestic operations. Such developments are likely to cause even further confusion.

### **CORPORATIONS MUST REMAIN ALERT TO THESE COMPETING RISKS**

Given that liability under U.S., UK, and EU law may extend to companies whose suppliers or contractors violate the law, it may be difficult for large companies to holistically review and address any misconduct in their supply chains, even if undertaken without their actual knowledge. Additionally, they will need to navigate competing state and federal priorities. All entities will have to remain aware of the increasingly complex and evolving web of statutory and regulatory developments in this area that give rise to legal, financial, and reputational risk.

To do this, corporations should consider addressing these issues in their compliance and risk mitigation procedures. Supplier and contractor codes of conduct may help establish relevant conduct standards for entities in their supply chain. Across industries, trainings and open tiplines can be implemented to assist employees to detect and report signs of forced labor. Audits and other compliance workflows can help ensure adherence to such standards if reviewed and addressed appropriately. Working with counsel can help reduce and address these issues as the legal landscape continues to change.

### **CONCLUSION**

Corporations across industries should consider reviewing, tracking, and appropriately adapting to developments in anti-trafficking law and theories of liability. Companies can begin to address these issues by carefully evaluating their compliance and risk mitigation procedures to ensure they adequately address forced labor across their own company operations and throughout their domestic and international supply chains.

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## ENDNOTES

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