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WHITE PAPER

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Labor Trafficking in Corporate Supply Chains— Where We Are Now

Legislatures and courts, both in the United States and abroad, are working toward the eradication of labor trafficking in corporate supply chains. In the United States, consumers have sued manufacturers for failing to disclose the presence of forced labor in their supply chains. These claims have been based on consumer protection laws, the Alien Tort Statute, and the Trafficking Victims Protection Reauthorization Act.

Outside the United States, countries around the world—including the United Kingdom, Australia, and the Netherlands—are combatting labor trafficking through legislation that requires companies to disclose steps taken to combat forced labor in their supply chains. Furthermore, litigation in the United Kingdom and legislation in the Netherlands has indicated that directors may be personally liable for labor trafficking that occurs in corporate settings.

These new developments demonstrate the increasing global focus on labor trafficking in corporate supply chains. Companies should therefore consider assessing existing compliance programs and consult with counsel and labor experts to ensure compliance with relevant law.

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INTRODUCTION

Addressing the global problem of human trafficking remains a focus of legislatures and courts both within and outside the United States. Specifically, governments and courts continue to aim at the eradication of labor trafficking in corporate supply chains.

In August 2018, Jones Day published a *White Paper* outlining new legislation and executive action aimed at curbing forced labor in supply chains. This Jones Day *White Paper* supplements that publication, setting forth developments in the areas of: (i) litigation within the United States; (ii) legislation abroad; and (iii) director liability.

UNITED STATES LITIGATION

While there have been few additional legislative updates in the United States this past year, there have been additional (and different) attempts at litigation based on discovered instances of labor trafficking in corporate supply chains.¹ Indeed, even in states without supply chain disclosure legislation, consumers have sued manufacturers for failing to disclose the presence of forced labor in their supply chains. A group of plaintiffs filed class action lawsuits in a Massachusetts federal court against chocolate manufacturers under Massachusetts' consumer protection laws.² The laws prohibit "unfair or deceptive acts or practices in the conduct of any trade or commerce."³ The named plaintiff alleged that she and other consumers would not have purchased products from the chocolate manufacturers if they had known that forced labor was present in their supply chains.⁴ By failing to disclose the forced labor, the chocolate producers, the plaintiffs alleged, were committing deceptive acts.⁵

The court dismissed the class's claims against all three defendants.⁶ The court reasoned that offering chocolate for sale implies that the product is fit to eat, "but does not on its own give rise to any misleading impression about how [the manufacturers or their] suppliers treat their workers."⁷ The court further explained that the defendants *did* disclose on their websites that their supply chains were likely tainted by child and slave labor.⁸ Despite dismissing the claims, the court recognized that "the use of child and slave labor in the production of cocoa ... is widespread, reprehensible, and tragic."⁹ An

appeal is now pending before the First Circuit. In addition, a substantially similar class action suit against one of the chocolate manufacturers was recently brought under California's unfair competition law and is pending before a federal court.¹⁰

Claims have also been brought against corporations under the Alien Tort Statute ("ATS").¹¹ In one case, former child slaves sued multiple corporations for aiding and abetting child slavery.¹² While the District Court twice dismissed the claims, the Ninth Circuit has now twice reversed and remanded to the District Court. The litigation has been ongoing for years, but recently, the Ninth Circuit denied a panel rehearing and a rehearing en banc, reaffirming its previous decisions to let the claims go forward.¹³ It reasoned that although the ATS does not have extraterritorial reach, the plaintiffs sufficiently alleged that domestic actions contributed to child slave labor.¹⁴

In addition, a federal court in California recently allowed a case to go forward in which the plaintiffs brought claims against an automotive manufacturer, among others, under the Trafficking Victims Protection Reauthorization Act ("TVPRA").¹⁵ The TVPRA allows victims of trafficking to seek monetary damages against not only perpetrators of trafficking, but also anyone who knowingly benefits financially from violations of trafficking laws.¹⁶ The plaintiffs worked long hours for a contractor of the auto manufacturer who built paint shop equipment at an automotive facility. The plaintiffs alleged that they were underpaid and were threatened if they tried to take time off.¹⁷ The court found that because the auto manufacturer was alleged to have known what time the plaintiffs entered and left work, and because the auto manufacturer instructed them on some of their work, the company knew or should have known about the mistreatment of the workers.¹⁸ The court therefore let the claims go forward.¹⁹

NEW LEGISLATION ABROAD

Countries around the world are combatting labor trafficking through legislation. As described in the August 2018 *White Paper*, the United Kingdom was the first nation to pass legislation mandating forced-labor disclosure statements, promulgating the Modern Slavery Act in 2015. Like California, it requires large companies that do business in the UK to conspicuously disclose on their websites the steps they have taken to combat forced labor in their supply chains.²⁰ Since the 2018 publication,

the British government commissioned an independent review of the law. The resulting report released in May, recommended several changes to give the law more teeth.²¹ The government has announced that it will accept some of these recommendations—it has already extended the disclosure mandate to the public sector; it committed to gather further evidence regarding creating an enforcement body to impose sanctions on non-compliant companies; and announced that it will explore stronger potential enforcement options in the future.²² While it declined to create a central registry of companies that had published the required statements, the government is currently carrying out an audit of compliance. Noncompliant organizations “risk being publicly named.”²³

These events in the United Kingdom illustrate efforts to increase the enforcement ability of supply chain disclosure laws. This trend can also be seen in new laws passed elsewhere. For example, in November of last year, Australia passed its own Modern Slavery Act. While similar to the UK version in many regards, the Australian act provides for a publicly accessible Modern Slavery Statements Register.²⁴ Companies must submit a disclosure statement to the responsible minister, who then publishes the statements in the Register; they may also voluntarily publish the statements on their websites.²⁵ Civil penalties for noncompliance were considered but not ultimately included in the act; however, the act specifically provides for a review in three years, at which time civil penalties for noncompliance will be reconsidered.²⁶ In addition, the minister may publicly name noncompliant companies if they fail to remedy their noncompliance.²⁷

In May, the Senate of the Netherlands passed the Child Labor Due Diligence Act (“Act”), which had been passed by the parliament’s lower house in 2017.²⁸ If approved by the King of the Netherlands, the law will be more stringent than its Californian, British, and Australian counterparts in two respects. First, in addition to requiring a disclosure statement, the Act creates a legal obligation to investigate whether a reasonable suspicion exists that a good has been produced using child labor.²⁹ If a reasonable suspicion does exist, then the company has a duty to create and implement a plan of action to address it.³⁰ Second, and notably, the Act creates criminal liability for companies who fail to meet their obligations. A company may be fined for failing to submit a statement that it is exercising due diligence, and if it fails to heed a remedial instruction from the relevant regulator, it may face increased fines. Finally, if

the company repeatedly commits the same violations within a five-year period, it may be subject to much larger fines, and the company’s directors may be held personally liable and imprisoned up to two years.³¹

Efforts have been made to pass similar legislation in Canada, Hong Kong, and Switzerland.³² While no laws have been enacted in these locations, they demonstrate the growing trend of using legislation as a tool to address forced labor in supply chains.

DIRECTOR LIABILITY

In a recent case in the United Kingdom, two company directors were held personally liable for what amounted to labor trafficking.³³ A group of Lithuanian nationals in the United Kingdom sued a fishing corporation for paying them less than minimum wage and for inappropriately docking and withholding pay.³⁴ The men were also allegedly subjected to terrible working conditions and long hours. A British court found two directors of the company to be personally liable for breach of contract and for statutory breach of violating various employment laws.³⁵ While the claims in this case were not brought under the Modern Slavery Act, this judgment serves as an example of the increased focus on labor trafficking issues in corporate settings. Further, as noted above, the recent Dutch Act provides for director liability in the case of repeated violations, a potential harbinger of expanded liability for directors in labor-trafficking cases.

CONCLUSION

Since last year, the global focus on labor trafficking in corporate supply chains continues to increase. Enforcement measures aimed at improving compliance, including criminal liability and public naming, are gaining steam in many jurisdictions. These issues are increasingly considered a key part of companies’ Environmental, Social, and Governance, or ESG, programs.

Companies should continue to ensure that they are compliant with current regulations and that they remain apprised of ongoing developments. This means they should consider assessing existing compliance programs and take appropriate action. Compliance programs should also be evaluated

regularly going forward as the law in this area develops. If no compliance program is in place, companies should consider whether to develop and implement one.

There continue to be expanded opportunities for assistance in navigating the legal requirements in this area, including from nongovernment organizations like the Responsible Business Alliance. In addition, companies should consult with counsel and labor experts to ensure compliance with relevant law.

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ENDNOTES

1 As set forth in the 2018 *White Paper*, federal legislators have introduced bills aimed at tackling forced labor in supply chains. The most recent was the Business Supply Chain Transparency on Trafficking and Slavery Act of 2018 (H.R. 7089). The bill sought to amend the Securities and Exchange Act to require companies to disclose anti-trafficking efforts conspicuously on their websites. Going a step further than its California counterpart, the bill would have required companies to disclose this information in an annual report to the SEC. While the bill ultimately expired at the end of the 115th Congress, it is one example of legislators' increased focus on labor trafficking in corporate supply chains.

In addition, a discussion draft of a bill has been introduced in the 116th Congress, the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019, which would require publically listed companies who file an annual report with the SEC to conduct

an annual analysis of the existence of any human rights risks and impacts in the operations and value chain of the company, and to rank them based on their severity. The bill would also require companies to provide a description of processes that they have in place to avoid or mitigate the risks and impacts identified.

Since last year, Washington State attempted to pass similar legislation. In early 2019, a Washington State Senator proposed a bill that would have required large agricultural retailers to disclose steps taken to prevent labor trafficking in their supply chains. The Transparency in Agricultural Supply Chains Act (S.B. 5693) would have required retailers of agricultural goods with gross receipts above \$200 million to make online disclosures similar to those contemplated by the proposed federal bill. However, the Washington bill went further than similar laws by mandating that the agricultural retailers also collect reports from their suppliers documenting any "violations of employment-related law or incidents of slavery."

Further, the Washington bill would have prescribed penalties of up to \$7,000 for each violation, plus punitive damages for willful violations. Violators may have also had to pay costs and attorney's fees, and the bill provided for injunctive remedies against violators. Violators may have also had to pay costs and attorney's fees, and the bill provided for injunctive remedies against violators. While the final version of the bill stated that the Attorney General may bring civil action against violators, the original version of the bill would have allowed any Washington resident to sue violators, even if he or she had not been personally harmed by the violation. In March, the Washington Senate Rules Committee indicated that the bill would no longer progress.

- 2 *Tomasella v. Nestle USA, Inc.*, 364 F. Supp. 3d 26, 31 (D. Mass. 2019).
- 3 *Id.* at 32, citing Mass. Gen.Laws ch. 93A § 2(a).
- 4 *Tomasella*, 364 F. Supp. 3d at 30-31.
- 5 *Id.*
- 6 *Id.* at 37.
- 7 *Id.* at 35.
- 8 *Id.* at 36.
- 9 *Id.* at 29.
- 10 Emily Field, "['Sustainable' Nestle Cocoa Made With Child Slavery, Suit Says](#)," Law360, Apr. 22, 2019.
- 11 28 U.S.C. § 1350.
- 12 *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018), *amended by Doe v. Nestle, S.A.*, No. 17-55435, 2018 WL 8731558, (9th Cir. July 19, 2019).
- 13 See *Nestle*, 2018 WL 8731558, at *2.
- 14 *Nestle*, 906 F. 3d at 1125-26.
- 15 *Lesnik v. Eisenmann SE*, 374 F.Supp. 3d 923 (N.D. Cal. 2019).
- 16 *Id.* at 951, citing 18 U.S.C. § 1595(a).
- 17 *Id.* at 952.
- 18 *Id.* at 953.
- 19 *Id.*
- 20 Modern Slavery Act (U.K.), Part 6: Transparency in Supply Chains Etc.
- 21 [Independent Review of the Modern Slavery Act 2015: Final Report](#).
- 22 [U.K. Government Response to the Independent Review of the Modern Slavery Act of 2015](#).

- 23 *Id.*
- 24 Modern Slavery Act (Austl.), Part 3: Access to Modern Slavery Statements.
- 25 *Id.*
- 26 *Id.*, Part 4: Miscellaneous.
- 27 *Id.*, Part 2: Modern Slavery Statements.
- 28 Oxford Human Rights Hub, "[Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence.](#)"
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 Thomson Reuters Foundation, "[Canada Moves One Step Closer to Supply Chain Legislation](#)"; National Law Review, "[U.S. Congress Joins the Growing Number of Countries Considering Supply Chain Transparency Legislation.](#)"
- 33 *Antuzis v. D.J. Houghton Catching Servs. Ltd.*, [2019] EWHC (QB) 843 (Eng.).
- 34 *Id.* at [1-3].
- 35 *Id.* at [132-33].

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