Emerging Anti-Modern Slavery Enforcement Trends

Compliance and Ethics

Corporate, Securities, and Governance

Cheat Sheet

- **Modern slavery.** Broadly speaking, modern slavery includes servitude, exploitative child labor, forced labor, human trafficking, sex-trafficking, debt bondage, and slavery-like practices.
- **Anti-slavery laws.** Modern slavery disclosure laws only require certain companies to report anti-slavery activity and/or conduct due diligence into slavery in their commercial operations.
- **Enforcement.** With more countries taking action to eradicate modern slavery, companies may now increasingly be faced with civil and criminal liability if they use or benefit from forced labor.
- **Modern solutions.** Implementing up-to-date anti-slavery programs can take cues from existing compliance structures, emerging trends, governmental guidance, and agency collaboration initiatives to mitigate ongoing risks.

Corporations, investors, consumers, and regulators are increasingly focused on human rights. In the last few years, we have witnessed the proliferation and adoption of human rights standards and laws based almost entirely on companies' voluntary evaluation and disclosure of their efforts to eradicate modern slavery in their commercial operations.

The primary enforcers were the public, non-governmental organizations, investors, and consumers. Recent indicators suggest that regulators, particularly in the United States, plan to join this list.

On Dec. 3, 2021, the United States released the 2021 National Action Plan to Combat Human Trafficking that called upon the US Department of Justice (DOJ) to enhance US efforts to combat human trafficking. The US Attorney General responded that the DOJ is "committed to using every tool at [its] disposal to prevent human trafficking; increase detection, investigation and prosecution."

These recent pronouncements, as well as an uptick in cross-departmental cooperation, signal an emerging trend toward increased human rights enforcement, including criminal enforcement, globally.

In this article, we explore current modern slavery laws, the potential emerging shift from a disclosure-based regime to an enforcement-based regime, and offer practical suggestions for how companies can consider evaluating and enhancing their human rights approach to address this emerging trend.

What is modern slavery?

The term "modern slavery" is an umbrella term that generally refers to the exploitation of individuals that cannot refuse or leave work because of threats, violence, coercion, abuse of power, or deception. Modern slavery definitions typically encompass slavery, servitude, exploitative child labor, forced labor, human trafficking, sex-trafficking, debt bondage, and slavery-like practices (e.g., forced marriage and deceptive recruiting for labor or services).

While slavery can sometimes be clear, some forms of it might not be obvious. Common indicators of "modern slavery" can include:

- **Poor working conditions or accommodations** (e.g., unsafe or unhealthy environments);
- **Exploitative financial arrangements** (e.g., debt bondage or withholding payment or salary);
- **Restriction of worker freedoms** (e.g., withholding passports);
- **Geographic/sector/product risks** (e.g., certain regions (such as Africa or the Asia Pacific), sectors (such as hospitality, agriculture, or construction), and products (such as rice, cocoa, and coffee) may present higher risks of modern slavery); and
- **Vulnerable individuals** (e.g., groups that might be particularly susceptible to exploitation, such as migrant workers, ethnic minorities, and children).

Though each case is unique, a common theme across instances of modern slavery is that it involves vulnerable populations that are coerced or deceived into exploitative circumstances with limited recourse.

The legal landscape

While anti-slavery laws may seem like a recent phenomenon, nearly every country has had laws for many years that prohibit modern slavery or treat freedom as a fundamental right. Despite these laws, the issue persists.

In the last few years, however, two additional bodies of law regarding modern slavery began developing simultaneously to drive behaviors aimed at eradicating modern slavery: disclosure laws and diligence laws.

Both bodies of law place companies squarely in the position of a key change agent in the fight against modern slavery.

Modern slavery disclosure laws

Disclosure laws focus on reducing modern slavery through public disclosure and discourse by requiring certain companies to disclose their efforts to eradicate modern slavery in their commercial activities.

These laws exist in California (California Transparency in Supply Chains Act of 2010), the United Kingdom (UK Modern Slavery Act of 2015), and Australia (Australia Modern Slavery Acts of 2018). Numerous other countries (e.g., Canada, New South Wales, and Hong Kong) have proposed similar laws, and commentators expect this trend to continue.

The laws require companies with revenue above a certain threshold to disclose on their public-facing websites (and, for Australia, submit to the customs authorities) a statement that details the company's efforts to prevent modern slavery in their commercial operations and/or supply chains. The disclosures typically must cover a variety of topics, including the company's structure, operations and supply chain, actions taken to assess and address relevant risks, and anti-modern slavery controls (e.g., policies, training, remediation), among other areas.

A novelty of these laws is that they do not explicitly mandate any measures be taken to eradicate modern slavery, just that companies disclose what they were doing, even if it was little or nothing.

Some practitioners interpret the Australian Modern Slavery Act to include an implicit expectation of diligence (or at least an evaluation) of their operations and supply chains, given the difficulty of reporting in the absence of the evaluation; however, the law does not contain an explicit requirement contained in the diligence laws.

Read more in "Modern Slavery Reporting — A Case Study of Fujitsu"

Even without explicit mandates, the laws spurred action at some companies and highlighted others' on-going positive efforts in the space.

Modern slavery diligence laws

Diligence laws focus on requiring companies, through diligence, to evaluate and manage their human rights practices.

Countries like France (*Loi de Vigilance* (Law of Vigilance), 2017) and the Netherlands (*Wet Zorgplicht Kinderarbeid* (Child Labor Due Diligence Act), 2019, eff. mid-2022) chose to enact laws requiring companies to conduct human rights due diligence and to develop an action plan to remediate any potential risks or issues.

Other jurisdictions in Europe have also announced similar proposals, including Germany,

Switzerland, and Norway. For example, Germany is in the process of implementing a Supply Chain Due Diligence Act, and the European Commission is expected to announce a proposal for pan-European mandatory human rights and environmental due diligence requirements in March 2022.

The diligence laws attempt to create a duty of care (or otherwise) for companies to evaluate their commercial operations, via diligence or other assessment, identify human rights risks, and develop an action plan to address and/or mitigate those risks.

While violations of the diligence law typically include potential civil penalties, regulatory fines, or, in the case of the Netherlands, criminal sanctions if a company receives two fines for violating the law within a five-year period, we are not aware of any enforcement actions that have resulted in regulatory penalties.

France's Law of Vigilance provided for significant potential fines of up to €30 million, but the French Constitutional Council found these penalties unconstitutional and suppressed the sanctions. And while there have been lawsuits filed in French courts, these suits assert damages rather than penalties or fines.

An emerging trend: Enforcement

The common criticism of recent anti-modern slavery laws is their lack of enforcement mechanisms. Several laws ostensibly create civil liability for companies that engage in human rights abuses, but the lawsuits brought under those laws have typically not been particularly successful.

Recently, the US Supreme Court further restricted lawsuits brought in federal court based on human rights abuses abroad. See Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931,1935 (2021), concerning a class action lawsuit against Nestlé USA and Cargill for allegedly aiding and abetting child slavery in Côte d'Ivoire by purchasing from cocoa producers that utilize child slave labor from Mali.

The critics state that, without enforcement, bad actors are neither punished nor deterred from engaging in misconduct. More recently, however, we are beginning to see shift to address this concern and bring regulatory enforcement to the forefront of anti-modern slavery measures. For example, the Netherlands Child Labor Due Diligence Act includes potential criminal sanctions and is considered the first instance of a modern anti-slavery law imposing potential criminal sanctions, but it is not slated to go into effect until mid-2022.

Beginning in 2016, the United States closed the "consumptive demand" exception to the Tariff Act of 1930. This change permitted the Department of Homeland Security to take more aggressive action to stop goods coming into the United States that may have been associated with human rights abuses, increasing the number of Withhold Release Orders (WROs) from zero between 2001 and 2015 to 26 between 2016 and 2020. More recently, in 2020, the US Customs and Border Protection agency issued its first civil penalty and forced labor finding since 1996.

The Tariff Act of 1930 prohibits the importation of goods, wares, articles, and merchandise mined,

produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions. The “consumptive demand” exception allowed affected goods to be imported if the US could not meet sufficient demand through US production.

Now, with the recent pronouncements by the Biden Administration and DOJ, it appears as if criminal enforcement may also be an emerging risk. While it is currently unclear how such a prosecution might unfold and some have argued current law would not support that approach, multiple government publications have cited the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 when discussing the legal implications of United States entity involvement in potentially forced or trafficked labor abroad.

According to these publications, the TVPRA creates civil and criminal liability for knowingly utilizing forced labor or consciously disregarding a substantial risk that it was benefiting from participation in a venture that uses forced labor. To date, there have not been any publicly known criminal enforcement actions under the TVPRA, but recent public pronouncements suggest that this might change in the future.

While too early to predict, the recent pronouncements by US regulators, coupled with the uptick in regulatory actions, suggest US enforcement officials are increasingly focused on human rights.

Furthermore, the potential for prosecution under the TVPRA is reminiscent of enforcement activity under the Foreign Corrupt Practices Act (the FCPA). As many readers may recall, the FCPA existed for many years before becoming a regular criminal enforcement tool. It is possible that the TVPRA might follow a similar trajectory as the FCPA as human rights issues become an increasingly area of focus for the DOJ.

Modern anti-modern slavery programs

The potential emerging shift in the anti-modern slavery landscape from a voluntary disclosure/diligence regime to an enforcement regime highlights the need for companies to develop, evaluate, and/or enhance their anti-modern slavery programs.

The key practical approach is to evaluate whether the anti-modern slavery program can borrow from or reflect the core elements of a compliance program organized pursuant to the US sentencing guidelines and DOJ guidance.

The following considerations can help companies target their evaluation of whether their programs are sufficiently tailored to manage potential human rights risks and issues in a potential new age of enforcement:

- **Policies and procedures** (e.g., internal and external codes of conduct and/or policies that set clear expectations or standards regarding human rights);
- **Training and awareness** (e.g., educational campaigns that include modern slavery risks and processes);
- **Risk assessments** (e.g., cross-functional internal and/or external assessments and/or supply

chain mapping to identify modern slavery risks);

- **On-going supplier engagement** (e.g., policy certifications, visits, or audits, as appropriate);
- **Reporting processes** (e.g., providing widely publicized and accessible contact information or anonymous whistleblower hotlines for individuals to raise concerns regarding suspected illegal or improper conduct);
- **Investigation and remediation** (e.g., mechanisms in place to investigate and remediate potential risks or issues, whether identified through reporting processes or via lessons learned evaluations); and,
- **Continuous improvement** (e.g., continuing to assess effectiveness through process reviews, assessments, and/or audits aimed at capturing current effectiveness and opportunities for improvement).

Many government agencies that oversee modern slavery provide helpful resources to assist companies in evaluating and addressing their enterprise risk, and to effectively build a compliance program. For example, the Australian authorities provide numerous resources to guide the creation (and continued improvement) of an anti-modern slavery program, including a program checklist with suggestions and examples, training guidance, disclosure writing tools, and even a yearly disclosure review to guide specific program enhancements.

Additionally, the United Nations Guiding Principles on Business and Human Rights provides helpful information on internationally recognized human rights best practices for companies' consideration. These resources, coupled with the DOJ's A Resource Guide to the US Foreign Corrupt Practices Act and Evaluation of Corporate Compliance Programs, also provide helpful guidance on how to develop or evaluate an effective compliance program, including many lessons for anti-modern slavery programs.

By focusing on existing compliance structures and learning from emerging trends and governmental guidance, companies can collaborate cross-functionally to coordinate enterprise efforts and better address global risk.

Conclusion

As the anti-modern slavery landscape shifts toward an enforcement regime, it is time for companies to take a fresh look at their anti-modern slavery approaches from a compliance perspective. By borrowing from compliance infrastructure and learnings, companies can leverage existing resources to thoughtfully address enforcement risk and to minimize potential liability.

Most importantly, companies can be actors of positive change for human rights.

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