Updates
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Understanding the UK's Impending "Name and Shame" Approach for Ridding Supply Chains of Forced Labor

The U.K. Modern Slavery Act of 2015, which was modeled after the California Transparency in Supply Chains Act, requires companies falling under its jurisdictional hook (and there are many) to honestly and completely disclose their efforts to eradicate trafficked, slave, indentured, coerced and child (collectively "forced") labor from their supply chains. This, like many things in the compliance world, is easier said than done. Indeed, based on our own in-the-trenches experience putting together disclosures for clients, helping them develop and implement anti-forced-labor compliance policies and procedures, and addressing issues when they arise, only a small percentage of companies have implemented disclosures that fully meet the letter (or spirit) of these laws.

The U.K. Home Office, as we discovered by reviewing a little-known tender announcement, is developing very public ways of forcing compliance on companies that (1) have an annual global turnover exceeding $47 million *and* (2) conduct "any business" in the U.K. Those companies that do not have adequate disclosures risk being placed on the U.K. Home Office's contemplated "name and shame" list of noncompliant companies and otherwise being subjected to official enforcement actions.

In fact, 17,000 CEOs worldwide received the U.K. Home Office's[1] October 18, 2018 letter reminding them of their company's obligation to publish the mandatory Modern Slavery Act annual transparency statement. There has been considerable anxiety and speculation concerning what this all means (the Home Office's letter unfortunately was not a model of clarity). The answer was, in fact, relatively close at hand; a recent **tender announcement** provides key insights into what may follow.

Home Office's Tender Tells the Tale—Publication of Noncompliant Companies and Injunctions Against Noncompliant Companies Are on the Enforcement Menu

The tender, which closed on March 22, 2019, was titled "Auditing compliance with Section 54 of the Modern Slavery Act 2015." As relevant here, the tender seeks a vendor/organization that, in exchange for £20,000-30,000, will conduct a one-time audit of the approximately 5,000 companies that are "in scope." The goal is for the vendor to determine compliance with—or, more accurately, to identify companies that are not in compliance with—the act's "minimum legal requirements."

Moving from the general to the specific, the Home Office's intent to pursue a "name and shame" approach emerges from the tender's Appendix B:

The information provided by the [selected vendor's] audit . . . may be used to inform enforcement action against non-compliant companies, potentially including publishing a list of non-compliant companies.[2]

Further, the tender reveals that the Home Office will write letters to noncompliant companies "[p]rior to any publication of the names of non-compliant organisations." Finally, the tender discusses the intended "use of [High Court] injunctions [brought by the U.K. secretary of state] against non-compliant companies."

Timing Is Everything

While the Home Office is not explicit, a fair inference from the timetable in the tender documents is that (1) the vendor will be awarded the contract on April 2, 2019; (2) a "project initiation meeting" will occur on or by April 19; and (3) the vendor must provide "outputs" (that is, a list of offending companies) in no more than six weeks.

In short, by May 31 the U.K. Home Office should be reviewing the vendor's list of noncompliant companies and determining its next steps in terms of "naming and shaming" and pursuing enforcement through injunctions.

As attorneys who have reviewed and drafted literally hundreds of supply chain disclosures and have designed and implemented corresponding compliance programs, we have learned through our practice that the number of companies that are likely noncompliant with the Modern Slavery Act will be considerable (both because some companies that are required to disclose simply do not do so and because some companies' disclosures fail to follow the technical specifications). And determining where a company falls on the (non)compliance continuum, and how to address any shortfalls, is something that has never been more time sensitive.

Who Must Comply With the U.K. Disclosure Requirements?

By way of brief background, multinational companies with business interests in the U.K. are now subject to an additional anti-trafficking regime by virtue of the U.K.'s efforts to fight against global human trafficking. Borrowing significantly from the California Transparency in Supply Chains Act, the Modern Slavery Act requires certain businesses to make a disclosure statement regarding forced labor on their websites. (See **here for a comparison** of the two acts.) The reporting obligation applies to each financial year.

Those familiar with the California act will recognize many of the U.K. act's requirements. There are some big differences, however, including the U.K. act's notably broader jurisdictional requirements. The U.K. act's disclosure requirements extend to any company (no matter where in the world it is headquartered or registered) that:

1. Carries on a business, or part of a business, in any part of the U.K.;
2. Has a total annual worldwide turnover of no less than 36 million British pounds (an amount determined by the U.K. secretary of state); and
3. Supplies goods or services.[3]

What Is a "Slavery and Human Trafficking Statement" Anyway?

In 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 merely provides that each fiscal year, a covered company must make a disclosure stating what it has done to ensure that forced labor is not taking place in its business or supply chain. It is left up to the company to determine what areas to address. Alternatively, the company can state that it has taken no such steps (for obvious reasons, this option is selected by few, if any, public-facing companies).

The Home Office describes the disclosure requirements this way:

The [vendor's] audit should identify whether 'in scope' organisations have complied with their legal obligations:

1. The Modern Slavery Statement must include details of the steps an organisation has taken to address modern slavery risks in operations and supply chains. If an organisation is not taking any steps to address modern slavery, then they must clearly state this in their Modern Slavery Statement. A Statement which simply asserts that a 'company has no modern slavery' in its business or supply chains without explaining the steps that have been taken to ensure this would not [be] considered compliant.

2. [The Statement must be] published on the U.K. website. The link should be available on the organization's U.K. homepage. If the organisation does not have a website, a copy of the statement must be provided to anyone who[] makes a written request for one.

3. [The Statement must be] approved by the Board of Directors (or equivalent management body). In order to demonstrate that this legal requirement has been met, the Home Office expects organisations' Modern Slavery Statements should clearly state that this approval has been given.

4. [The Statement must be] signed by a director (or equivalent).

In any event, it is critical that the disclosure be 100% accurate, neither overstating nor understating the company's actual activities. Best practices teach that the disclosure statement should, but does not have to, include:

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

Who Must Approve Such a Statement?

The U.K. act attempts to promote accountability by requiring that 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 a general partner's signature, and any other partnership must get a partner's signature.

Where Must Such a Statement Be Disclosed?

Closely tracking the California act, the U.K. Modern Slavery Act requires that any company with a website:

1. 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.)

OK . . . So What Are the Penalties for Noncompliance?

As recognized in the tender discussed above, 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.

That said, civil litigation brought by shareholders, advocacy groups and consumer groups that focuses on allegedly inaccurate, incomplete or misleading reporting of a company's efforts is one of the most concerning potential "penalties" facing companies under the U.K. act.[4] The other major penalty comes in the form of the aforementioned "name and shame" campaigns—but this time it is the U.K. government, rather than an advocacy organization, that is leading the charge.

Yikes! I Am Not Sure We Are Complying—What Should We Do?

The following are our best-practice guidelines for those just getting started with (or fine-tuning) their compliance programs and related disclosures:

1. Introduce and enforce meaningful policies (or add policy language) focused on identifying and eliminating risks emanating from the various forms of forced labor within a business's supply chains. Among other places, such internally-consistent policies or policy language should be included in codes of conduct, annual compliance certifications, standard contract language, due diligence questionnaires and supplier statements of conformity.

2. Adopt standard contract language that addresses, 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 nonperformance/problems;
- The right, as needed, to contact the relevant authorities in the case of violation(s); and
- Consent to follow a company-developed action plan in case of any instances of noncompliance.

3. Design a risk-based labor verification/audit program to evaluate and address risks of forced labor in the company's supply chains. As a company develops this program, it should:

- 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; and
- Ensure that audits of suppliers evaluate supplier compliance with company standards for eliminating forced labor.

4. Require appropriate certifications so that suppliers in the supply chain must 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 forced 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 forced 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 the company's code of conduct;
- Refrains from corrupt practices and does not engage in human rights violations; and
- Certifies that it has not, and will not, directly or indirectly, engage in certain activities connected to forced labor. (These activities should be expressly detailed in the certification.)

5. Develop and publicize internal accountability standards, including those related to supply chain management and procurement systems, and procedures for employees and contractors regarding forced labor. Make sure you have procedures in place for employees and contractors who fail to meet these standards.

6. Assess supply chain management and procurement systems of suppliers in the company's supply chains to verify whether those suppliers have appropriate systems to identify risks of forced labor within their own supply chains.

7. Train employees and business partners, particularly those with direct responsibility for supply chain management, on the company's expectations as they relate to forced labor, particularly with respect to mitigating risks within the supply chains of products.

8. Guarantee that remediation is provided for those who have been identified as victims of forced labor.

The fight against human trafficking has without question entered a new phase as consumers and governments come to expect that companies (and their compliance officers) will do their part to ensure that their supply chains and, ultimately, their products, are free from the taint of forced labor. The U.K. Home Office is increasing the stakes for compliance with the Modern Slavery Act by demonstrating a serious intent to publicly expose noncompliant entities. In addition to the threat of an impending "name and shame" campaign, companies could also face regulatory enforcement through an injunction, or face civil litigation by activist shareholders. Thus, the U.K. Home Office has transformed compliance with the Modern Slavery Act from a "nice-to-have" to an absolute "must-have" in a company's compliance and disclosure arsenal.

ENDNOTES

[1] The U.K. Home Office is a ministerial department of Her Majesty's Government of the United Kingdom, responsible for immigration, security, and law and order.

[2] See Appendix B, available at https://www.contractsfinder.service.gov.uk/Notice/ e16bc40e-6740-4743-859b-45bc56af5206.

[3] This last requirement is in contrast to the California act, which applies only to companies that are either retail sellers or manufacturers.

[4] This has also been the case with the California act.

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