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Unprecedented state law targets forced labor

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In numerous legislative attempts to combat human trafficking throughout the past decade, federal statutes have largely focused on sexual exploitation. Now, California is turning its attention to forced labor with a new, unprecedented state law.

Signed into law by Gov. Arnold Schwarzenegger in September 2010, The California Transparency in Supply Chains Act (SB 657) will take effect in January 2012. The law is the first of its kind nationwide, and intends to decrease human trafficking by keeping large companies that operate in California (an estimated 3000) publicly accountable for the potential of forced labor within their supply chains, through disclosure of their efforts to monitor and address human trafficking among suppliers.

Forced labor, under international standards, essentially encompasses any work performed involuntarily (including indentured servitude), enforced by threats or physical compulsion. Recent studies have documented the pervasiveness of the problem. A 2009 report from the U.S. Department of Labor Report identified 122 goods from 58 countries produced by forced labor. According to a recent report by the U.S. State Department, 21 of the 43 human trafficking prosecutions that were initiated between October 2008 and September 2009 involved labor trafficking.

The state law is the result of intense lobbying efforts by human rights and other non-governmental organizations, which envision it as a way to permit California consumers to reward those companies that take proactive measures to identify and address the risks of forced labor among their suppliers. The Act, however, requires nothing beyond disclosing what steps, if any, companies take to monitor human trafficking and slavery risks in their supply chains.

SB 657 adds Section 1714.43 to the California Civil Code, and Section 19547.5 to the Revenue and Taxation Code, and applies to large retail sellers and manufacturers that "do business in California." "Retail sellers" and "manufacturers" are defined as companies that report their principal business activities as "retail trade" or "manufacturing" on their tax returns. To fall under the law, a retail seller or manufacturer must have annual worldwide receipts that exceed $100 million. Companies that "do business in California," as delineated by the Tax and Revenue Code, meet any one of four criteria: the company is organized or domiciled in California; or sales in California exceed the lesser of $500,000 or 25 percent of the company's total sales; or the value of real and personal property located in California exceeds the lesser of $50,000 or 25 percent of total property; or the amount paid by the company in California in compensation exceeds $50,000 of 25 of the company's total compensation.

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Given the low threshold, it is safe to assume that the law will apply to almost any company with worldwide gross receipts of $100 million and a presence in California.

In order to comply with the Act, a company subject to the law is required to "disclose ... its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale." California Civil Code Section 1714.43(a)(1). Provided that it operates an Internet website, a company must post the required information under a "conspicuous and easily understood link" on its homepage. For those without a website, the information must be sent within 30 days to individuals who make a written request for it.

The disclosure must include information on whether, and to what extent, a company does five things:

Engages in "verification" of its product supply chains to "evaluate and address" the risks of "human trafficking and slavery." The disclosure must specify if the verification is not conducted by a third party.

Conducts supplier audits to "evaluate supplier compliance with company standards for trafficking and slavery in supply chains." This disclosure must state if the verification "was not an independent, unannounced audit."

Requires its direct suppliers to certify that "materials incorporated into the product" comply with the laws regarding slavery and human trafficking "of the country or countries in which the suppliers do business."

Maintains "internal accountability standards and procedures" for employees and contractors who fail to meet "company standards regarding slavery and trafficking."

Provides training on human trafficking and slavery to those company employees directly responsible for the company's supply chain management. California Civil Code Sections 1714.43(c)(1) — (5).

Under the Act, the Franchise Tax Board must provide the state attorney general with a report of companies subject to the law based on information contained on their tax returns. This deadline for this list is Nov. 30, 2012 (based on tax returns received by the Franchise Tax Board by Dec. 31, 2011, and by December 31 every year thereafter). It is unclear, therefore, when enforcement efforts will begin.

Regardless of when the state attorney general turns its attention to the issue, it would be unwise for large retailers and manufacturers to conclude that they can delay compliance until late next year. Non-governmental organizations and advocacy groups will most likely take leading roles in monitoring compliance with the law, and publicizing which companies (in their view) are falling short. It is such publicity, rather than enforcement by the attorney general, that is likely to prove most problematic for California companies.

It bears emphasis that no proactive steps are required to ensure compliance with the statute. Companies can meet their requirements by simply stating that they take no steps to evaluate the risk of human trafficking in their supply chain, and require no commitments by

Companies must report anti-human trafficking efforts

suppliers or employees regarding the use of forced labor in the goods that the companies produce or offer for sale in California. It is highly questionable, however, whether large, visible companies operating in California will deem it satisfactory to publicly announce that they take no steps to monitor human trafficking among their suppliers.

In terms of remedies for violating the Act, the only enforcement mechanism authorized by the statute is an action by the state attorney general for injunctive relief. Nevertheless, the statute expressly provides that it does not limit the remedies available "for a violation of any other state or federal law." California Civil Code Section 1714(d). That includes the federal Victims of Trafficking and Violence Protection Act of 2000, which permits the victims of forced labor to file suit against the perpetrators in federal court.

In 2004, for example, the American Civil Liberties Union sued a New York City hotel on behalf of housekeepers for violation of that law; that case was later settled. Presumably, a company's failure to take at least modest steps to measure the existence of forced labor in its supply chain, while not a violation of the Act, can be used as evidence of a dereliction of its legal obligation under federal statute and state common law. The enforcement provision of the Act, therefore, will likely be seen as cold comfort to large companies operating in California.

Indeed, companies subject to the Act may use its mandatory disclosure as an opportunity to trumpet their efforts to combat forced labor and sweatshop conditions. Prudent companies will likely wish to implement, at a minimum, some or all of the following: promulgating clear standards with respect to the use of forced labor by their suppliers; creating a record that their suppliers are informed of the policy and certify that they follow it; and training their own employees to be cognizant of the risks of forced labor among suppliers, to recognize when it exists, and how to address it.

Aggressive compliance with the Act has the potential to create its own pitfalls, however. Chief among them is the risk of joint employer liability, for companies that control the terms and conditions of employment of their suppliers' employees. Companies would do wise, therefore, not to let a commitment to combating forced labor on the part of suppliers manifest itself as directing the work performed by employees of their suppliers, or dictating the precise compensation, benefits, or hiring criteria for their suppliers' workforce. It is far more preferable for companies to articulate policies on human trafficking and forced labor, and to have the suppliers acknowledge and agree to abide by them.

Another challenge likely to confront companies is how to deal with information that comes to their attention regarding the practices of their suppliers. In short, are companies that discover unsavory labor practices by their suppliers assuming an obligation to remedy those practices? While no easy answer exists, companies will likely wish to include, at a minimum, a provision in supplier contracts stipulating that failure to abide by their standards for forced labor and human trafficking constitutes grounds to abrogate the contract.

Though the California statute sets a precedent for the regulation of labor trafficking issues, legislative developments in this area at state and federal levels appear to be rapidly gaining steam — a bill introduced in September by U.S. Rep. Sharon Maloney (D-NY) and Rep. John Carter (R-TX) would mandate the reporting by state and local governments of human trafficking along with other violent crimes under federal law enforcement grant requirements. Politicians and advocacy groups hope that increased responsibility on the part of companies and governmental organizations will have an impact on forced labor and human trafficking. The next several years should provide some insight as to whether that is truly the case.

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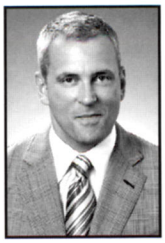

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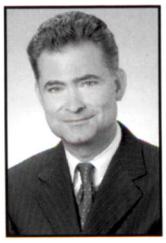

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