

Managing Corporate Supply Chains: Challenges & Successes in the Fight to Combat Forced Labour and Human Trafficking

A corporate leader's nightmare scenario - discovering the existence of forced labour and human trafficking upstream in their company's supply chain. In a world of complex supply webs, migrant workers, labour agents, sub-suppliers, and a constant squeeze on costs, such a scenario keeps corporate leaders and their stakeholders awake at night for good reason. No industry or region is fully insulated from the social deficit which has emerged from the rise of the modern global economy, and all leading multinational corporations have come to recognize the risks associated with ever expanding supply networks.

Baker & McKenzie has consulted with many of our most valued global clients as well as other professionals in the corporate community in an effort to identify the challenges they face in managing their complex supply chains as they work to keep them free from trafficking and forced labour. Our hope is that the results of our interviews, research, and our own experience working with international organizations will provide valuable information on best practices in this field, along with an honest assessment of the many challenges multinational corporations face as they work to navigate in this difficult area.

Scope of the problem

The statistics are staggering. An estimated 14.2 million people worldwide are enslaved in various forms supporting the global economy.¹ At any given moment, approximately three of out every thousand people on the planet are suffering in some form of forced labour. Forced labour, while more prevalent in the developing world, is not isolated to any specific part of the globe.² Indeed, examples of forced labour activities exist in the United States, Canada, and the United Kingdom.³

It is, of course, critical to recognize at the outset that the global corporate supply chain can be a force for good. It is effective at providing significant benefits to end-users and those in the lower echelons of the supply chain. Global supply chains can, among other things, assist in providing a wide range of low-cost products to consumers, an influx of capital to assist development in developing nations, a living wage for those in parts of the world with little alternative opportunity for economic progress, and higher profits and returns to corporate investors and employees.⁴ In the modern global labour market, there is a continuous supply of workers in foreign jurisdictions ready and willing to produce goods at a lower cost than the domestic labour market, and, in many instances, this is a positive development for workers in communities overseas and for the corporations downstream in the supply chain, along with the consumers who buy their products.⁵

However, global labour and product supply chains, containing multiple levels of subcontracting, particularly throughout the developing world, where labour laws are non-existent, or not enforced, also provide fertile ground for forced labour conditions to arise.⁶ Corporations are often immune from domestic legal accountability given the extraterritorial nature of their supplier relationships and the arm's length nature of supplier contracts and subcontracts.⁷

1 International Labour Organization, Global Estimate of Forced Labour [Special Action Programme to Combat Forced Labour, 2012] ch 2 <<http://www.ilo.org/sapfl/lang--en/index.htm>> accessed 12 January 2014.

2 Anti-Slavery International, Slavery Today, <www.antislavery.org/english/slavery_today/forced_labour.aspx> accessed on 23 March 2014; E. Christopher Johnson Jr, 'The Corporate Lawyer, Human Trafficking, and Child Labor: Who's in your supply chain?' [2013] Thomas M. Cooley Law Review, vol 30:1, 28 (Johnson notes that some estimates put the figure in excess of the number of slaves transported to the west during the Atlantic slave trade).

3 See for example, a report on forced labour conditions discovered on citrus farms in Immokalee, Florida, see: John Bowe, 'Nobodies: Does Slavery Exist in America?' The New Yorker (New York, 21 April 2008) <www.newyorker.com/archive/2003/04/21/030421fa_fact_bowe> accessed 23 January 2014; for a report on forced labour in the British seafood industry, see: George Arbuthnott, 'Trawler Slaves: The Slaves in Peril on the Sea' The Sunday Times Magazine (London, 19 January 2014), 14.

4 E. Christopher Johnson Jr, 'The Corporate Lawyer, Human Trafficking, and Child Labor: Who's in your supply chain?' [2013] Thomas M. Cooley Law Review, vol 30:1, 28.

5 Debra Cohen Maryanov, 'Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain' [2010] Lewis and Clark L Rev vol 14:1, 399.

6 Andrew Crane, 'Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation' [2013] Academy of Management Review Vol 38 No 1, 52.

7 Naomi Jiyoung Bang, 'Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases' [2013] 35 Hous J Intl L 255, 257; see also: *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L. Ed. 2d 671 [2013] ("*Kiobel*"). The U.S. Supreme Court's decision in *Kiobel* restricted the reach of the U.S. Alien Tort Statute, 28 USC s 1350, reducing corporate litigation risk in the area of overseas human rights violations; including forced labour.

Traditional notions about the profile of the victims have been dispelled in recent years. Traffickers and unscrupulous labour agents prey upon marginalized ethnic minorities, undocumented migrants, children, indigenous peoples, and the poor, among others, because their particular circumstances often make them reluctant to seek the help of the authorities and their vulnerabilities make them easily coerced and manipulated.

Given that this issue affects people of all ages, genders, and ethnicities, it is not surprising that modern slavery transcends industry and region. Victims have been found in a wide variety of job settings and industries, including in technology, hospitality, construction, apparel, and food production, among many others.

Recently, the United States Department of Labor produced a list setting out 122 products or goods produced in 58 countries using forced labour, child labour, or both.⁸ The items included on this list are as varied and common as strawberries, shrimp, footballs, coffee, chocolate, palm oil, bricks, rubber, and cotton. This is clearly not an isolated problem. It is a significant concern in terms of its scope as well as its moral implications.

⁸ United States Department of Labor, 2013 List of Goods Produced by Child or Forced Labour (Report required by the Trafficking Victims Protection Reauthorization Act) <http://www.dol.gov/ilab/reports/pdf/2013TVPRA_Infographic.pdf> accessed 12 October 2014.

Responses from all directions

Leading businesses understand the importance of pursuing long term sustainable business strategies and fulfilling their obligations as global corporate citizens by working to combat this global scourge. The fundamental principles that are guiding corporate leaders in pursuing reform and action in this area are found, most prominently, in the United Nations Guiding Principles on Business and Human Rights.⁹ The U.N. Guiding Principles make clear that states have a duty to protect against human rights abuses, and that corporations have a responsibility to respect human rights by taking steps to prevent abuses and to remedy infringements.

Our research and experience reveals that companies are taking proactive steps to operationalize their social expectations by embracing human rights due diligence procedures and implementing remedial action plans, particularly in the area of trafficking and forced labour.

A recent report, jointly released by the American Bar Association, the School of Politics and Global Studies, and the McCain Institute of Arizona State University, indicates that 54 percent of Fortune 100 companies have policies targeting human trafficking and 68 percent have a commitment to supply chain monitoring, with most using a mixture of internal and external monitoring methods.¹⁰ More than 60 percent also express a commitment to providing training for staff and supply chain vendors.¹¹ When operating in countries with weak enforcement regimes and ineffective central or local governments, corporations understand that they must be vigilant to ensure that they are not benefitting or taking advantage of a vacuum of proper regulatory authority.

In addition to voluntary corporate action, governments are beginning to recognize that to fulfill their obligations to prevent human rights abuses by corporations domiciled or operating within their territory, including for forced labour violations committed abroad, they must enact regulatory legislation, which compels corporate entities within their jurisdiction to take action to ensure they are not responsible for, or contributing to, forced labour practices throughout their global operations. Whether it is at the international level, through the UN and the International Labour Organization, or at the national or regional level, legislators and policy-makers are actively seeking regulatory mechanisms focused on corporate practices.¹²

⁹ U.N. Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy Framework", U.N. Doc A/HRC/17/31 [21 March 2011] (the "U.N. Guiding Principles") <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 2 May 2014

¹⁰ American Bar Association and Arizona State University, *How Do Fortune 100 Corporations Address Potential Links to Human Rights Violations in a Globally Integrated Economy*, June 2, 2014.

¹¹ *ibid.*

¹² See, International Labour Organization, Forced Labour Convention, C29 [28 June 1930]; UN Expert Meeting on Trafficking in Persons, Human Trafficking & Global Supply Chains: Background Paper (12 November 2012, Ankara, Turkey) 5 <<http://www.ohchr.org/Documents/Issues/Trafficking/Consultation/2012/BackgroundPaper.pdf>> accessed 27 May 2014; In 1998, ILO Convention 29 -which defines and prohibits forced labour - was identified by the ILO as one of eight "core" Conventions, see <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf> accessed 12 April 2014.

In the US, in recognition of both the magnitude of global human trafficking and forced labour, and the fact that the US federal government is one of the world's largest procurers of goods, President Obama recently signed Executive Order 13627¹³ prohibiting US federal contractors and subcontractors from their own misleading or fraudulent recruitment practices, charging employees recruitment fees, destroying, concealing, confiscating or denying access to employee identity documents and failing to pay for return transportation costs upon the end of non-US employment. The Executive Order also requires that any federal contractor and subcontractor permit access to audits by the US contracting agencies. For those US federal contracts and subcontracts for not off-the-shelf products where more than USD \$500,000 is performed outside the United States borders, the Executive Order further requires the creation of an "awareness program" to prevent subcontractors at any tier from engaging in trafficking of persons and requires the contractor's monitoring, detection, and termination of any subcontractor who has engaged in such activity.

A Novel Legal Response - The California Transparency in Supply Chains Act 2010

Until the passage of the California Transparency in Supply Chains Act of 2010 (the "CTSCA"), existing state, national, and international laws relating to forced labour and trafficking were centered on prosecuting direct perpetrators and the protection of victims, both of which are critical elements to an overall strategy to combat forced labour. To complement existing laws, the State of California took a bold step toward regulating foreign supply chain management by enacting legislation focused on corporate transparency.

The CTSCA came into force on January 1, 2012 as a first-in-the-world effort to combat forced labour and human trafficking through corporate supply chain disclosure requirements and consumer awareness efforts.¹⁴ Following on California's lead, other jurisdictions have considered similar measures, including the US federal government, the British Parliament, and the European Union.¹⁵ California has historically been a legislative leader in the area of consumer and environmental protection laws, and as evidenced by proposed reforms in other jurisdictions, its adoption of a supply chain transparency law will undoubtedly have a ripple effect.

It is important to highlight the reach of the CTSCA. California's size and the fact that it is the world's ninth largest economy ensures that a significant number of the world's global manufacturing and retail companies are

¹³ U.S. President Obama, Executive Order 13627 - Strengthening Protections Against Trafficking in Persons in Federal Contracts (25 September 2012).

¹⁴ California Transparency in Supply Chains Act 2010, Cal Civil Code s 1714.43, SB 657 (2012).

¹⁵ See for example, United States Business Transparency on Trafficking and Slavery Act, HR 2759 (112th); Transparency in UK Company Supply Chains (Eradication of Modern Slavery) Bill 2012-13; UK Draft Modern Slavery Bill HC 1019, Session 2013-14; U.S. President Obama, Executive Order 13627 - Strengthening Protections Against Trafficking in Persons in Federal Contracts (25 September 2012); see also, the UK announcement on 25 June 2014 that it will be producing recommendations to assist industry in eliminating human rights abuses in their supply chains <<https://www.gov.uk/government/news/government-asks-retailers-to-lead-the-way-on-transparent-supply-chains>> accessed August 18, 2014; EU Directive 2013/34/EU, requiring disclosure by public companies of non-financial information on policies, outcomes and risks relating to social matters, among other things.

captured by the law. All those we interviewed agreed that the introduction of the CTSCA had an impact on their approach to this issue and required them to reassess and examine their policies and procedures. Our informal discussions with corporations on these issues echoed the importance of this legislative act. Given this impact, we believe it is important to highlight the CTSCA's requirements and its effect on multinational corporations to date.

In its preamble, the CTSCA recognizes the criminal nature of forced labour and the fact that significant legislative efforts have been made to capture and punish perpetrators and to protect victims. It also acknowledges that legislative efforts to address the market for goods and products tainted by forced labour have been lacking, despite the fact that the market is a "key impetus for these crimes." Finally, it states that "consumers and businesses are inadvertently promoting and sanctioning these crimes" and that without available disclosures, "consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking."

(a) Which companies are affected?

The CTSCA applies to companies (a) doing business in the state of California with more than \$100 million in annual worldwide gross receipts, and (b) that list either retail sales or manufacturing as their principal business activity on their corporate tax return.

It broadly defines "doing business" to include companies that, for example, have California sales in excess of \$500,000; or have a California payroll exceeding \$50,000.

(b) What is required?

A company that meets this standard must disclose its efforts to eliminate forced labour and human trafficking from its direct supply chain for tangible goods offered for sale.

The required disclosure must be posted on the company's web site with a conspicuous and easily understood link to the required disclosure information. The disclosure must, at a minimum, disclose to what extent, if any, the business does each of the following:

1. Verifies product supply chains to evaluate and address the risk of human trafficking and slavery (the disclosure must specify if the verification was conducted by a third party or not);
2. Performs supplier audits to evaluate compliance with company standards (the disclosure must specify if the verification was an independent, unannounced audit or not);
3. Requires certification by direct suppliers that materials used in products comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;

4. Maintains internal accountability standards and procedures for employees or contractors that fail to meet company standards on slavery and trafficking; and
5. Trains relevant company employees and management on trafficking and slavery, particularly concerning the mitigation of risk within supply chains.¹⁶

Early Indicators from the First Supply Chain Disclosure Law

Although the impact of any new law takes time to fully assess, one is able to get an early picture of the CTSCA's effect by reviewing the first wave of corporate disclosures. Importantly, NGOs have begun assessing the information posted by companies in response to the law's requirements. One website (www.knowthechain.org) has been developed through a partnership between a number of civil society organizations, which provides a user-friendly search engine tool for the corporate disclosure reports arising under the CTSCA.

Using this tool, one can relatively easily review and compare disclosure reports for the companies captured by the law's requirements. A review of the CTSCA disclosures reveals that companies are responding to the law in one of five ways.

Some companies are embracing the requirements by detailing the extensive policies and measures they have in place, highlighting their commitment to combating forced labour in their supply chain. Next, there are companies that have indicated that while they have not, to date, undertaken significant steps in this area, they are committed to taking action going forward. There are then corporate disclosures which merely track the language of the law and indicate compliance without providing any supporting statements or referencing any specific steps being undertaken. Fourth, there are companies that disclose that they are taking no steps to identify or eradicate human trafficking or forced labour from their supply chains.¹⁷ And finally, there continue to be companies that are simply unaware of the CTSCA or their obligation to provide disclosures regarding whether or not they take the enumerated steps to eradicate human trafficking and slavery.

Beyond the actual disclosures, our interviewees have indicated that the CTSCA requirements have provided an opportunity for companies to reexamine their supply chains with a renewed focus on preventing forced labour. Whatever its shortcomings, the CTSCA has created increased corporate and consumer awareness around this issue, and a drive in other jurisdictions, including the UK and Europe, for the introduction of laws modelled on California's effort.

¹⁶ For further discussion, see Cynthia Jackson, "California Requires Supply Chain Disclosure", [2011] *The Recorder*, November 2011.

¹⁷ Jonathan Todres, "The Private Sector's Pivotal Role in Combating Human Trafficking" [2012] *Cal L Rev Circ* vol 3, 88.

How is the Corporate World Addressing Human Trafficking & Forced Labour?

Beyond complying with the law, companies are increasingly implementing and updating their enterprise risk management systems and programs into their supply chains. Many companies require contractual and other measures that allow for close monitoring, regular audits, and reporting with a specific focus on eliminating the potential for trafficking and forced labour to arise within their extended enterprise.

We set out to examine what our clients are currently doing that has been successful, what challenges they face in implementing and enforcing their policies, and what lessons they have learned along the way.

With the rise of the global economy and the wide range of industries affected, human trafficking and forced labour has entered the supply chains of an increasing number of companies. As a result, our interviewees, while devoting resources and commitment to eradicate trafficking and forced labour, acknowledge the possibility of it being present somewhere in their supply chains given the complex web of suppliers they deal with and the pernicious nature of the problem.

A vast majority of the companies consulted are multinational organisations operating in a wide range of fields, including manufacturing, retail, agriculture, hospitality, media, and IT. They have all built internal teams focused on compliance, CSR, supply chains, and legal issues that are dedicated to eliminating human trafficking and forced labour from their corporate supply chains. The interviewees, along with the experience of Baker & McKenzie, provides for a representative sample of leading multinational corporations whose supply networks are at risk of trafficking and forced labour. The leaders that participated in this review have deep awareness, knowledge, and experience with the challenges involved in addressing these issues and are committed to overcoming them.

Successful Initiatives

1) Partnerships

Each company we interviewed highlighted the fact that to be successful in this effort, companies must join forces and partner together to combat this scourge. We noted that recent partnerships have emerged over the past few years to allow companies to unite and identify solutions to combat human trafficking and forced labour in their supply chains that are sector and industry specific. For example, the Global Business Coalition Against Human Trafficking (gBCAT), launched in 2012 to mobilize the power, resources, and thought leadership of the business community to end human trafficking,

including all forms of forced labor and sex trafficking, has been effective at providing a forum for businesses to share best practices and to set industry-wide standards.

In the IT sector, a number of our clients have joined the Electronic Industry Citizenship Coalition which is a coalition of the world's leading electronics companies working together to improve social, ethical, and environmental responsibility in their global supply chains.

Although these initiatives represent positive steps, what we heard over and over is that the issue is complex, not static, and individual circumstances must drive strategy. In other words, one-size rarely fits all. However, it was also a recurring theme that there is tremendous value in cooperation and joint action between industry leaders on how best to address the issue of human trafficking and forced labour in their corporate supply chains. This is an area where experienced companies recognize the need to come together and share ideas, practices, successes, and failures, while ensuring a collective commitment to the issue.

Brenda Schultz, Director for Responsible Business Americas at Carlson, a leading global hospitality company, with over 100,000 employees, stated "overall, Carlson does not depend on one silver bullet in the fight against human trafficking. We are continuously looking for new and creative ways to make a difference and raise awareness among audiences who can assist in spreading the word." Traffickers and recruiters are becoming more and more sophisticated and companies understand that they must be agile.

There is clear recognition that the issue is one that transcends traditional barriers to cooperation, with the result that there are many stakeholders, including business, NGOs, investor activists, religious-based groups, law enforcement, and government that have a common objective with unique insights and tools to bring to bare.

Bob Mitchell, Global Manager for Supply Chain Management at HP, a global multinational IT company, with over 300,000 employees around the world, highlighted the importance of cooperative leadership from IT industry leaders working alongside NGOs and governments as a model for addressing these issues. Specifically, Mr. Mitchell noted that individual companies can become experts in specific areas and then provide best practice methods and lessons learned to the industry community. For example, HP actively took a lead in the area of student worker rights and has developed an industry leading response to ensuring the ethical treatment of this group. In 2013, HP introduced its "HP Student and Dispatch Worker Guidance Standard for Supplier Facilities in the People's Republic of China." A first of its kind in the industry, the guideline document equips HP's suppliers with a roadmap for the responsible management of this category of worker. It was noted that other companies took the lead on issues such as conflict mineral sourcing, and then together, through cooperative organizations and partnerships, began sharing their knowledge and approaches.

We also heard from interviewees that partnerships are often developed and strengthened at issue-focused seminars and conferences, and can form interesting bedfellows with governments and others. For example, on a regional level, Sabre, a leading travel technology company, with 10,000 employees in 60 countries, organized a slavery and trafficking conference along with law enforcement, which resulted in raising awareness of this issue not only within their company but within the policing community.

2) Codes of Conducts and Contracts

Many companies indicated that they are now collaborating with NGOs and with competitors in their industries to develop sector-wide best practices which are then being included within their codes of conduct and supplier contracts. This approach can have an exponential benefit to raise the bar within a sector while bringing a consistent approach. A number of our interviewees have taken the initiative and asked for legal advice in adopting appropriate codes of conduct and drafting best practices for supply chain contracts and codes. These best practice contracts and codes are then required when a company enters into a contract with a supplier, ensuring that the company's expectations with regard to human trafficking and forced labour are clearly set out from the beginning of the relationship. This common approach has the effect of extending the commercial terms to drive the implementation of measures to combat this issue.

Carlson, for example, was one of the first hotel companies to sign the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism in 2004, and they have since incorporated the anti-trafficking language into their Code of Business Ethics, Suppliers Code of Conduct, and also directly in to their supplier contracts.

SC Johnson, a leading global household products company, with over 13,000 employees worldwide, has long-standing policies on issues of minimum pay and decent working conditions, and is rolling out a new supplier code of conduct that addresses the issue of human trafficking in its supply chains.

We have observed through our interviews that all of the companies we interviewed have internal legal frameworks and clear expectations in place around this issue. Mr. Mitchell indicated that HP made a decision to focus on trafficking and forced labour in the past decade, and that the Global Manager for Supply Chain Management reports directly to HP's General Counsel on these issues, illustrating how the evolution of solutions and attention to these issues has corresponded with a growth in viewing these challenges through a legal and compliance framework, which includes professionals and principles from HR, procurement, corporate social responsibility, and legal/compliance.

While companies have previously taken a "zero-tolerance" position to human trafficking and forced labour, our interviewees challenged this notion as perhaps, too simplistic, failing to address the root causes.

Complex challenges often require complex answers. Corporate thought leaders on this issue are beginning to move away from the black and white remedies of no tolerance toward a remediation focused approach in order to better protect potential victims. Instead of immediately shutting down a supplier, for example, many industry leaders are now using a worker-first approach which, in the first instance, calls for engaging with suppliers to improve practices. Our interviewees discovered that suppliers that they had terminated, opened up “down the block” under new names, employing the same practices in a new location. Mr. Mitchell noted that for HP, remediation is a process, not an event. Its goal is to fix the issue at the source. Safe jobs in dignified working conditions that respect their human rights is the goal.

3) Training, Education, Auditing, and Measuring

Creative corporations are developing innovative tools to train their suppliers and employees. Some of our interviewees use third-parties to conduct training, others have developed their own training tools to raise awareness and to help create direct connections within their company on this issue. Even for those companies not required under the CTSCA to disclose whether they undertake internal training, we have heard from interviewees that it is equally important to educate employees as it is to work with suppliers on this issue. They indicate that human trafficking and forced labour can be difficult to detect and so they are working to ensure that their employees and suppliers understand the various red flags, both generally and specific to industries and regions. When a supply chain is not actually chain but a web, it is vast and difficult to map. If it is not mapped, it is impossible to know what lingers in the corners that multinational corporations do not control, observe, or even know exist.

Many of our interviewees, including those not covered by the CTSCA disclosure requirements, are ensuring that their anti-trafficking and forced labour initiatives are on their corporate websites as a way to publicly declare the company’s aspiration to eradicate it from their supply chains. Anti-trafficking and forced labour language is in their agreements, contracts, and communications to vendors, suppliers, and others. They set standards for themselves and aim to communicate them to all those who would do business with them.

Carlson, for example, advised that their employees worldwide are required to attend training courses focused on this issue, and that the employees of hotels involved in servicing visitors to large global events, including the Olympics, World Cup, and Super Bowl, must take refresher training in advance of the event. To ensure compliance, third-party audits are regularly employed as well. The result is that, in Carlson hotels around the world, employees are being educated on this issue, in order to enable them to spot the signs that their hotels may be being used to facilitate trafficking, often in the form of sexual exploitation.

Similarly, Sabre has ubiquitous training across its broad reach and shares its training videos with other companies as models for creating their own training videos. In an industry where competition is as robust as travel and tourism, the consensus is that there is no turf in good ideas for addressing inhumanity.

A number of interviewees are engaged in third party auditing and shared reflections on what that can reasonably accomplish and where it is limited. None view it as a panacea, but rather, one arrow in their quiver of tools to battle a multifaceted problem. Generally, there is a growing recognition that third party audits uncover more than audits completed using internal staff. And utilization of audits rather than blind reliance on their repetition leads some to use them creatively. For example, one interviewee is introducing surprise audits of its suppliers in countries outside the U.S. with a specific focus on exposing trafficking and forced labour. As the CTSCA recognizes in requiring disclosure of whether audits are announced or unannounced, advance warning of audits can provide unscrupulous suppliers with the opportunity to correct misconduct in the short term, providing a false sense of compliance.

A key concept among thought leaders was the need for mature and varied “sensing mechanisms” that include a range of measurements, which, when viewed together, provide a detailed picture of risks and red flags for compliance officers. Sensing mechanisms may include internal as well as external indicators. For example, companies look to NGOs for data and research, and media outlets for regional and industry-specific trends and events. Aggregating these and other data points makes a company more intelligent in its approach to this issue.

Mr. Mitchell indicated that HP employs an integrated strategy in which it absorbs and files as many data points as possible into a searchable database in order to be able to spot and react to an emerging issue before it extends beyond its control. Mr. Mitchell cited the importance of the work that journalists and NGOs do in highlighting the issues and exposing weaknesses in corporate policies and intelligence.

Challenges?

We asked corporate leaders the critical question, despite their considerable efforts and focus on protecting their supply networks from human trafficking and forced labour, “what keeps you up at night?” It was in the diversity and complexity of answers that it is clear that the noblest of efforts in this space may serve only to open new areas of concern. Among the insightful answers we heard were these:

- Difficulty in uncovering less visible forms of forced labour and trafficking;
- Obfuscation of trafficking victims by the sheer magnitude of the network of suppliers that results from globalization in so many industries;
- Inability to exercise control over third party contractors and sub-suppliers;
- Recognizing the full impact companies can have upstream in their supply chains;
- Complexity of supply webs and the difficulty in mapping and policing them; and
- Lack of regulatory oversight and enforcement in many source countries.

Challenge 1 - Spotting the Hidden Truths

Many corporate compliance programs in the tourism industry, for example, were initially focused primarily on targeting sex trafficking. While efforts to eradicate sex trafficking must be continued and expanded, companies more recently began focusing on the full scope of human trafficking and forced labour that can be present in their business networks and supply chains.

Identifying what qualifies as forced labour can be a complex task for companies, as the modern world has seen the emergence of new forms that are often difficult to detect. NGOs we interviewed, for example, shared that companies they counsel are challenged to determine if certain workers have accumulated extensive recruiting debts or had their identification papers and passports withheld by recruiting agencies or suppliers. Before you can address a problem, you have to see it and understand it. Understanding alone is informative but ineffective without the revelation of where intervention is needed.

Tackling the issue of excessive recruitment fees and the confiscation of workers' passports is now a priority for a number of our interviewees even if they are not covered by Executive Order 13627. Strategies vary but all acknowledge this as a perfect example of how collaboration between industry competitors helps to reveal the best strategies. And, this is an excellent example of an instance where self-regulation is likely the fastest route to impactful change.

Solution: Quick Fixes On The Long Road To Long-Term Change

We have found that some companies have voluntarily embraced the prohibitions of Executive Order 13627 even if they are not US federal contractors or subcontractors. A number of companies have introduced strict prohibitions for suppliers against confiscating workers' passports or other identity documents. We learned that companies are providing safe storage facilities for workers' identity documents that are expected to be freely accessible to workers at all times.

Similarly, policies on recruitment fees are increasingly being included as part of supplier due diligence processes. The emerging best practice is to ensure that workers are always asked anonymously and confidentially – preferably by independent third parties – whether they were charged recruitment fees or have had their identity documents confiscated either en route to the job or in the place of employment. Some of our interviewees engage us to vet and recommend labour brokers to assure they build relationships with reputable entities. This is especially important in industries where foreign labour requires a brokerage relationships. These, among others, are examples of how companies are working to ensure they are diligent in uncovering the more subtle forms of coercion that lead vulnerable workers to feel compelled to work for little or no pay under inhumane conditions.

Challenge 2 - Controlling Complex Supply Webs

The practical problem that companies often struggle with is their inability to fully map out their immensely complex supply chains because they are not linear links but multi-dimensional webs of relationships far from the direct control or even contact with multinational corporations. Companies are often unsure of how deeply into their supply chains they should investigate in order to root out trafficking and forced labour. It is not unusual for companies to have thousands of suppliers and sub-suppliers throughout their supply chain. Even where laws have aimed to provide guidance as to the depth of responsibility in addressing similar transnational issues like anti-corruption, for example, the parameters of responsibility and accountability can still be unclear.

What is troubling to a number of the professionals we interviewed is the fact that there is an uneven playing field in this area, as many competitors and new entrants do not feel responsible for their suppliers. It is not uncommon in a diverse and evolving industry that the lowest common denominator can derail others if they are uninspired to reach to the higher goals of their colleagues. That said, most are undeterred from the objective of combating this issue within their own operations while raising the bar for others.

Solution: Self-Governance & Regulation to Level the Playing Field

Walgreens, the largest drug retailing company in the US, indicated that setting industry-wide standards, as witnessed in the food industry, is one approach that has been effective. As HP noted, legislation around conflict minerals focused a great deal of attention on that particular issue and resulted in significant corporate resources being applied to combat and address the sale of minerals from the Democratic Republic of Congo that were supporting violence in that region.

Legislation in the form of the CTSCA and trade debarment tools assist to ensure that companies educate themselves on the issues, along with their responsibilities and obligations. Complimentary to that, industry-wide standards - either through voluntary agreements or regulation - can provide companies with the framework, criteria, and tools to implement measures to eradicate forced labour and trafficking. Interviewees agreed that legal mandates without specific and meaningful industry standards or consistent enforcement render the laws impotent and ineffective.

Challenge 3 - A Drop in the Bucket

Linked to a sense that they lack real control over their suppliers and sub-suppliers, some companies do not realize the full extent of the impact they can have in this area when they demand best practices be followed and ensure that supplier contracts reflect their priorities.

Despite the challenges companies are facing, it is important to keep in mind that many of the actions to combat this issue necessarily must take place behind the scenes. Some clients, for instance, have deliberately chosen not to feature their success stories on their websites or otherwise. Their measure of success is a lack of incidents and a shared knowledge among their colleagues in the industry. Corporations are not engaging in anti-trafficking activities for the publicity or the branding opportunity, but simply because they are concerned about these issues.

Companies have also expressed the difficulties they have encountered in drafting effective policies and codes. They have looked to NGOs, governments, and their competitors for guidance but, again, industry and sector-specific standards are repeatedly called for as a way to ensure across the board action and to level the playing field among competitors. A victim-centered approach to identification of trafficking violators and, along with it, a focus on remediation as a means of helping victims is considered best practice. Once a code of conduct is in place and an audit reveals the presence of an issue in a company's supply chain, companies are still faced with the difficult challenge of how to handle the problem. How much should a company defer to the local authorities? How can companies ensure that the victims do not end up in the hands of a new, possibly worse, supplier?

Solutions: Many

1) Cooperation

Even corporations that are very active in preventing and combatting human trafficking and forced labour agree that their efforts alone will not be sufficient in tackling this important issue. The recommendation we heard repeated across multiple interviews and industries was that combined efforts at both the private and the public sector level must be enhanced and embraced. This recurring theme is born out of a review of the many successful and unsuccessful efforts. Some industries have come together to develop collaborative solutions to the problem and are more sophisticated than others. The hospitality industry, for instance, is at the forefront of combatting sexual exploitation, and pharmaceutical and technology companies have developed robust codes of conduct for dealing with migrant workers and labour recruiters. But all agreed, even greater collaboration with a broad spectrum of stakeholders will lead to greater successes.

2) Remediation

As detailed, companies want to avoid punishing the victims through heavy-handed, reactionary responses. Many interviewees favour implementing policies that will, for instance, allow victims to be employed under better working conditions at another supplier. Others are putting in place or sponsoring counseling programs for victims. One interviewee that is very active in this field observed that there are very few programs in place that provide employment opportunities and retraining for victims of human trafficking and forced labour. As such, they are considering developing educational programs for victims that would allow these individuals to find alternative employment.

3) Integrated Approaches

In order to be successful, companies recognize that they must integrate their approach to trafficking and forced labour with other aspects of their compliance efforts and with other stakeholders. A fragmented approach runs the risk of leading to conflicting policies, practices, unclear enforcement structures, information gaps, and a host of other issues. It was recognized by a number of interviewees that within companies, top-level management must support and drive these initiatives as part of a company's broader legal and compliance efforts.

Conclusion

Global multinational corporations have significantly grown, in terms of size, assets, resource control, and revenue, not to mention societal influence. In fact, the largest among them have become equivalent to national governments in terms of economic power.¹⁸ This growth has been accompanied by growing expectations by society and government, which has manifested itself through various means including legislative and

18 Robin T. Byerly, 'Combating Modern Slavery: What Can Business Do?' [2012] J of Leadership & Accountability vol 9(5) 3, 30.

regulatory action and NGO activism. Leading companies recognize, not only the intrinsic importance of embracing the expectations that come with such a position, but also the economic rationale underlying its social license to operate, others have been slow to rise to this challenge.

While globalization continues to produce significant economic and social gains for many in all regions, the competitive modern economy also continues to create a social deficit, part of which includes the scourge of forced labour and human trafficking. The fight to eradicate forced labour has re-emerged as a defining issue of this century, and it cannot be left to any one stakeholder alone. Given the influence and impact that multinational corporations have, there is a significant role for corporate leaders to champion reform and action in this area. Many leading companies already understand that their strategies shape the lives and life chances of millions. The best and brightest global companies believe that business is an integral pillar of society and, in order to build enduring profitability, they recognize that the people they rely on at home and abroad cannot be afterthoughts or units to be exploited and castoff, but are instead central to building sustainable and lasting businesses and communities.¹⁹ Responsible corporations know it is not only good for the community to respect basic human rights, it also good for business.

The dream of a global economy free from forced labour and trafficking must become a reality for the millions of victims who go out into the world seeking nothing more than honest work in the hope of building a better life. Our interviewees have made it clear that greater cooperation between corporate competitors, NGOs, and governments is the path they are paving to those solutions. While progress is being made, comprehensive solutions have yet to be discovered and failure to find them keeps corporate leaders up at night. These start with increased and innovative supply chain transparency, monitoring, auditing, mapping, and information sharing between and among corporations and other societal institutions. On that path, it is foreseeable that the dream of ending human slavery will come closer to a reality. It simply must.

The interviewees, and the global companies they represent, are deeply committed to continuing to advance the efforts to eradicate forced labour, human trafficking, and other serious violations of international labour and human rights norms.

Our interviewees and Baker & McKenzie hope that the insights shared in this paper will assist in advancing the efforts and best practices toward our collective objective; the eradication of forced labour and human trafficking.

¹⁹ Rosabeth Moss Kanter, 'How Great Companies Think Differently' Harvard Business Review (Cambridge: November 2011) 4.

Contributors

In producing this White Paper, Baker & McKenzie lawyers consulted with some of our most valued global clients as well as other professionals in the corporate community in an effort to identify the challenges they face and the solutions they are implementing in managing their complex supply chains as they work to keep them free from human trafficking and forced labour.

Led by **Kevin Coon**, **Cynthia Jackson**, and **Angela Vigil**, this White Paper is the culmination of collaboration between a number of Baker & McKenzie lawyers and valued clients. Contributing associates included **Louise Balsan**, **Christopher Westman**, and **Chris Burkett**.



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