

## The Future Of Business And Human Rights: More Regulation

By Christopher Walter and Tom Plotkin

*Law360, New York (August 16, 2017, 12:13 PM EDT)* -- Since the founding of the United Nations and the adoption of the Universal Declaration of Human Rights in 1948, countries throughout the world have implemented legislation aimed at addressing various human rights concerns, such as discrimination, slavery, health and safety and freedom of expression.

Despite this robust and nearly worldwide acknowledgement of the importance of protecting human rights, some countries have implemented human rights laws in an inconsistent manner, with little appetite or budget for meaningful enforcement.

Partly in response to these shortcomings, civil society has more recently focused on business as an actor with the potential to improve global human rights conditions by, among other things, sharpening their supply chain monitoring and prevention tools. While many businesses have taken the mantle in adopting impressive internal human rights controls, both within their own operations and across their supply chain, recent benchmarking exercises suggest other companies have been slower to do so.

Most experts now agree that a system of largely voluntary corporate human rights compliance, often embedded within corporate social responsibility initiatives, has failed to maximize businesses' potential to combat global human rights abuses. Several governments are pushing businesses to improve the monitoring and combating of human rights abuses in their supply chains.

Some of the first laws passed sought only to regulate transparency and required companies to publish what efforts they take, if any, to combat human rights abuses. However, over the course of only a few years, more wide-reaching laws have been proposed or adopted across the globe, placing new compliance requirements on business.

In this article, we consider recent and proposed legislation that is intended to plug some of the gaps between international "soft law" requirements and perceived market shortcomings.



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## **Transparency**

The first pieces of supply chain human rights legislation focused on transparency. For example, under the U.K.'s Modern Slavery Act (MSA), companies carrying on business in the U.K. with a turnover of £36 million or more must publish annual slavery and human trafficking statements, describing any steps taken to monitor and prevent slavery and human trafficking in the company's supply chains.

The MSA was drafted along terms similar to California's Transparency in Supply Chains Act (TSCA), which requires companies with worldwide revenues of \$100 million or more who provide goods or services in California to disclose the extent to which they engage in certain anti-slavery and anti-trafficking monitoring within their supply chains.

The same year that California passed the TSCA, the U.S. Congress passed the Dodd-Frank Act, requiring certain companies to disclose to the U.S. Securities and Exchange Commission and the public whether their products use conflict minerals connected with the conflict in the Democratic Republic of Congo region, and if so, to make various additional disclosures.

Neither the TSCA nor the MSA impose financial penalties on companies for non-compliance. Rather, these laws seek to leverage the risk of harm to brand reputation in order to incentivize increased corporate human rights monitoring. While a company may technically comply with these laws by stating that it does nothing to combat human rights abuses in its supply chains, both laws assume that the risk of harm to brand reputation will drive companies to institute some form of supplier code and related monitoring and compliance programs.

Likewise, Dodd-Frank does not ban or penalize companies who use conflict minerals, and instead seeks to incentivize improved behavior through disclosure. When they were first passed, many viewed these laws as a sensible approach that split the difference between voluntary initiatives and more burdensome regulation.

It is estimated that over 20,000 companies fall within scope of the MSA, many of which will have been compelled to take a close look at supply chain management issues for the first time. More recently, the 2017 EU Non-Financial Reporting Directive requires large public companies to disclose information relating to its respect for human rights, including information on business models, due diligence policies and the outcomes of implementing those policies.

## **Over Time, Stricter Laws Were Enacted**

Despite relatively positive reviews of the transparency-based laws, more stringent supply chain human rights laws have since emerged.

In 2015, the Obama administration promulgated new rules on human trafficking for government contractors. Beyond mere transparency, all government contractors are required to comply with rules that prohibit several practices directly or indirectly used in the trafficking industry, require contractors and their agents to notify employees globally of the anti-trafficking policies, and set forth a notification procedure for contractors who believe they may have uncovered trafficking in their supply chains.

Certain high-value contracts incur additional duties, such as adopting compliance plans for combatting trafficking and conducting due diligence to remove any subcontractors who use trafficked or forced labor. The sanctions imposed for failing to comply with these requirements include financial penalties,

termination for default, suspension, debarment and potential litigation, including false claims suits. Compared to laws focused on transparency, the anti-trafficking rules imposed far greater requirements on contractors.

In 2017, France passed into law a Corporate Duty of Vigilance. The duty of vigilance requires companies to draft and implement “vigilance plans,” which include reasonable measures to identify and prevent risks of serious infringement to human rights and fundamental freedoms. The law applies to companies registered in France with at least 5,000 employees worldwide whose head office is located in French territory, or companies who employ at least 10,000 employees worldwide whose head office is located abroad.

These obligations can extend to parent companies, as well as subsidiaries, suppliers and contractors with which the company has a commercial relationship. Failure to comply may subject companies to civil penalties of up to €10 million, and lawsuits, whose damages awards can reach up to €30 million.

Overall, existing supply chain human rights laws show a pattern of increasing scope and liability.

### **New Legislation Is Under Consideration**

The evolution of supply chain human rights laws in the U.S., U.K. and France has inspired proposed legislation in other jurisdictions.

For example, in February 2017, the Dutch Parliament passed a Child Labor Due Diligence Bill that would require companies who are established or provide goods and services in the Netherlands to carry out child labor due diligence, identify instances of child labor within their supply chains and develop plans to combat those incidents discovered. The bill is awaiting approval by the Senate, but if passed, penalties range from court-ordered improvement plans to imprisonment.

In addition, Switzerland is currently considering an amendment to its constitution that would require Swiss companies to conduct human rights due diligence on all activities abroad, identify real or potential human rights violations, and take action to prevent any such violations. Remedies include civil sanctions and civil liability.

Australia has also begun considering its own Modern Slavery Act. While the proposal is similar to the U.K. law, 35 global investors with over \$1 trillion USD in assets have pushed for legislation that would go further, including mandatory supply chain mapping and due diligence requirements.

Even in the U.S. and the U.K., efforts are continually underway to strengthen and increase human rights protections through legislation. In the U.K., parliament is considering two pieces of relevant legislation. First, there is a proposal to amend the MSA which, if enacted, would render certain content of a disclosure statement mandatory and require companies that have taken no steps to eradicate slavery and human trafficking to explain why.

Additionally, proposed regulation 57 would amend the 2015 Public Contracts Regulations to prevent bidders from participating in public procurement procedures unless they have complied with the obligation to publish an MSA statement. Like the anti-trafficking rule for government contractors in the U.S., proposed Regulation 57 would impose stronger incentives for companies to adopt anti-trafficking and forced labor programs.

Additionally, as part of the Criminal Finances Act of 2017, the U.K. adopted a provision that permits government authorities to seize assets from people who have carried out gross human rights abuses or violations outside the U.K. It remains to be seen whether this bill will be applied in a corporate context or used as a tool for human rights litigants. In the U.S., at least a dozen bills aimed at combatting human trafficking have been introduced since the 115th Congress was sworn in in January 2017.

### **The Global Political Environment Is Ripe for a Surge in Legislation**

The current state of business and human rights law is evolving against a particularly favorable backdrop. Global political developments and the increasing accessibility of information over the internet provide strong incentives for governments to address global human rights concerns.

In the United States, some recent setbacks for human rights proponents may ultimately inspire more legislation. After Dodd-Frank was passed, opponents challenged the conflict minerals rule in court. The D.C. Circuit Court of Appeals ruled that forcing companies to indicate whether their products are conflict-free or not was an unconstitutional violation of the First Amendment. In turn, the SEC suspended the rule's due diligence review and audit requirements.

In June 2017, the House of Representatives went one step further, passing the Financial CHOICE Act, which would completely repeal the conflict minerals rule. Additionally, President Trump's proposed 2018 federal budget includes a provision cutting funding for the Department of Labor's Bureau of International Labor Affairs (BILA) by 77 percent. The BILA, which works with international labor organizations and provides statistics and technical assistance on global child labor and human trafficking issues, is a popular agency with both business and labor communities.

While these developments represent a diminution in human rights protections, more liberal U.S. states may be incentivized to follow California's lead and pass their own human rights laws, especially as a rebuke to the Trump administration. Ironically, new and differing state laws may ultimately push businesses to request national legislation to provide for simpler and more uniform compliance options.

Similar political forces may spur more legislation in Europe as well. After the U.K. Brexit vote and the surprise election of Donald Trump in the U.S., observers perceived an increase in support for isolationist policies. Shortly thereafter, the Netherlands and France held national elections in which prominent isolationist candidates lost to more centrist and globally-oriented leaders. The U.K.'s subsequent snap election in which then pro-Brexit Theresa May lost the Conservative majority suggests a trend away from isolationism and a return to globally-oriented policies.

Legislation targeting human trafficking and forced labor in supply chains is an effective way for countries to engage in these international issues. Indeed, we have already seen stronger legislation emerge in France, the U.K., the Netherlands and Switzerland. Other European countries may follow suit.

In addition to the global political climate, social activism and the proliferation of information over the internet have spurred a new focus on global human rights. Issue campaigns are now easily disseminated over social media, and effectively-marketed issues can explode in popularity in a single day.

In turn, businesses face risks of boycott campaigns or similar PR disasters. But governments are also on the hook. Citizens who learn that their products are manufactured by slave labor in foreign countries often look to government for answers. This growing social focus on global human rights places a new incentive on governments to pass legislation and proactively address these issues.

## The Takeaway

Between the evolution of existing and proposed legislation, and the state of the global political and social environment, a picture of increased attention to these issues emerges. While governments continue to consider new legislation, businesses can be proactive.

Engagement with stakeholders, internal codes of conduct, suitable awareness-raising campaigns, increased requirements for contractors and subcontractors and stronger supply chain monitoring tools can all help to prevent noncompliance, avoid the cost and operational interruption of having to remedy human rights breaches and mitigate risk of potential adverse PR consequences. The alternative is continued monitoring of legislation and reacting to new laws as they inevitably arise.

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