



Federal Statutory and Regulatory Framework on Forced Labor in Healthcare and Public Health Supply Chains

TO: All stakeholders involved in the procurement of healthcare and public health goods or services

SUBJECT: Federal statutory and regulatory framework on forced labor in health and public health supply chains

Background

In December 2021, the White House released the *National Action Plan to Combat Human Trafficking* (“National Action Plan”), which calls on agencies to “strengthen efforts to identify, prevent, and address human trafficking in product supply chains and ventures.”¹ The National Action Plan’s emphasis on supply chains reflects lessons learned from COVID-19, namely “the need to...ensure uninterrupted access to essential goods in times of crisis without fueling corruption, exploitation and forced labor.”² Since many “essential goods” like personal protective equipment (PPE) are procured through healthcare and public health (HPH) supply chains, the U.S. Department of Health and Human Services (HHS) published the *National Strategy for a Resilient Public Health Supply Chain* in July 2021 (“National Strategy”). Among other objectives, the National Strategy aims to “ensure equitable labor conditions by promoting best practices and U.S. adherence to child labor and forced labor laws and regulation” in HPH supply chains.³

Federal agencies are working together to respond to the priorities laid out in both the National Action Plan and National Strategy through a coordination framework comprising the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons,⁴ particularly the Procurement and Supply Chains Subcommittee of its Senior Policy Operating Group⁵ and the

¹ National Action Plan, Principle 1.3, <https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf>

² National Action Plan, p. 2

³ National Strategy, Objective 1.4, Sub-objective 2, <https://www.phe.gov/Preparedness/legal/Documents/National-Strategy-for-Resilient-Public-Health-Supply-Chain.pdf>

⁴ Established by § 105 of the Trafficking Victims Protection Act of 2000, Pub. Law 106-386, available at <https://www.congress.gov/bill/106th-congress/house-bill/3244/text>; To learn more about the task force, visit <https://www.state.gov/agencies-of-the-presidents-interagency-task-force-to-monitor-and-combat-trafficking-in-persons/>

⁵ To learn more about the Senior Policy Operating Group, visit <https://www.state.gov/senior-policy-operating-group/#:~:text=The%20TVPA%2C%20as%20amended%20in,all%20aspects%20of%20human%20trafficking>

Forced Labor Enforcement Task Force,⁶ as well as public-private forums like the Commercial Customs Operations Advisory Committee⁷ and the Joint Supply Chain Resiliency Working Group of the HPH Sector and Government Coordinating Councils.⁸ As an active participant in these coordinated efforts, the Office on Trafficking in Persons (OTIP) in the Administration for Children and Families at HHS has produced this Information Memorandum (IM) for healthcare administrators, procurement professionals, suppliers, and other decisionmakers in the HPH sector who may be positioned to address forced labor concerns in supply chains through product procurement and labor contracting practices. The IM explains how forced labor occurs in HPH supply chains, overviews relevant laws and regulations, and compiles relevant policy guidance and additional resources.

Forced Labor in Healthcare and Public Health Supply Chains

HPH supply chains encompass every point of production, from raw materials, suppliers, manufacturers, and equipment to finished products (e.g., drugs, biological products, medical devices, PPE, and ancillary supplies), including the end users procuring the products. The “backbone” of these supply chains is the workforce.⁹ For the purposes of this IM, “procurement” includes the acquisition of contract labor through recruitment agencies to deliver clinical care and ancillary healthcare services (e.g., food, custodial, and laundry services).

Individuals in the HPH workforce may encounter forced labor at any stage of the supply chain, from sourcing and production to service delivery. According to the International Labour Organization (ILO), indicators of forced labor include abuse of vulnerability, deception, restriction of movement, isolation physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime.¹⁰ HPH sector organizations may inadvertently facilitate and even benefit from these abuses through product procurement and labor contracting practices. This section of the IM will provide examples of forced labor in HPH supply chains that exhibit many of the ILO indicators.

Product Procurement

Healthcare systems and other end-users in HPH supply chains may facilitate and even benefit from forced labor by procuring HPH products from companies that:

⁶ Established by section § 741 of the United States-Mexico-Canada Agreement Implementation Act, Pub. Law 116-113, available at <https://www.congress.gov/bill/116th-congress/house-bill/5430/text>

⁷ To learn more about the Commercial Customs Operations Advisory Committee, visit https://www.cbp.gov/trade/stakeholder-engagement/coac?language_content_entity=en

⁸ To learn more about the HPH Government Coordinating Council, visit <https://www.phe.gov/Preparedness/planning/cip/HPH/Pages/Government-Coordinating-Council.aspx#:~:text=The%20HPH%20Government%20Coordinating%20Council,aligned%20with%20the%20HPH%20Sector>. To learn more about the HPH Sector Coordinating Council, visit <https://www.phe.gov/Preparedness/planning/cip/HPH/Pages/Sector-Coordinating-Council.aspx>

⁹ National Strategy, p. 60

¹⁰ ILO Indicators of Forced Labor (International Labour Organization 2012), p. 3, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf

- Use forced labor in their manufacturing; or
- Source raw material inputs from suppliers that use forced labor.

The COVID-19 pandemic shined a spotlight on the risks of forced labor by manufacturers in HPH supply chains. For example, as demand for PPE like rubber gloves increased, so did awareness of how these gloves are produced. Nearly two-thirds of the world's rubber gloves are made in Malaysia, large quantities of which end up in U.S. hospitals.¹¹ Many of the workers manufacturing gloves are migrants, who are particularly vulnerable to forced labor. In 2020, the U.S. Department of Labor (DOL), in adding rubber gloves produced by forced labor in Malaysia to its *List of Goods Produced by Child Labor or Forced Labor*, noted reports that indicated that there were "42,500 migrant workers employed in the Malaysian rubber glove industry."¹²

Once migrant workers arrive in Malaysia, they often find themselves living and working in poor conditions. As one reporter described:

*"They work 12-hour shifts, 6 days a week, on factory floors where temperatures can surpass 100 degrees...for less than \$1.50 an hour" then "sleep 40 to a room in stifling dormitories, bunk beds placed just a few feet apart even during the pandemic."*¹³

Indeed, the pandemic created new risks for abuse as short-staffed glove manufacturers pressured laborers to work even more hours to meet higher quotas in light of dramatically increased demand.¹⁴

Debt bondage is one of the common ways migrant laborers are compelled to work in Malaysia's rubber glove industry, despite the poor conditions. Migrant laborers come from Bangladesh, India, Myanmar, and Nepal, brought by recruitment agencies that charge workers exorbitant recruitment fees of up to \$5,000.¹⁵ These fees can take migrants years to pay off, trapping them in debt bondage. Additionally, perpetrators of forced labor in the rubber glove supply chain compel migrant laborers to continue working by threatening penalties, restricting movement, and withholding wages and identification documents.¹⁶

Other products sourced across the global supply chain with concerns of forced labor for the HPH Sector include *inter alia*, coltan (Democratic Republic of the Congo); cotton (Benin, Burkina

¹¹ Bengali, S., *These gloves help fight COVID-19. But they're made in sweatshop conditions* (L.A. Times Sept. 22, 2020), <https://www.latimes.com/world-nation/story/2020-09-22/covid-19-malaysia-gloves-forced-labor>

¹² 2020 List of Goods Produced by Child Labor or Forced Labor (U.S. Department of Labor 2020), p. 72, https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPR_List_Online_Final.pdf

¹³ L.A. Times, *supra* note 11

¹⁴ L.A. Times, *supra* note 11

¹⁵ L.A. Times, *supra* note 11

¹⁶ List of Goods, *supra* note 12

Faso, China, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan); electronics (China, Malaysia); garments (Argentina, Brazil, China, India, Malaysia, Thailand, and Vietnam); rubber gloves (Malaysia); and sugarcane (Burma, Brazil, Bolivia, Dominican Republic, and Pakistan).¹⁷ Some of these products could be intersecting with the HPH supply chain in whole or in part. While research on forced labor in HPH supply chains is limited, existing literature points to concerns of forced labor in surgical consumables (e.g., garment, instruments, monitoring equipment)¹⁸ and medical device manufacturing sourced from Xinjiang, China.¹⁹

Service Procurement

HPH sector organizations may also facilitate and potentially benefit from forced labor by hiring contract workers from staffing, labor, and recruitment agencies engaged in forced labor or abusive labor practices.

Healthcare systems rely on contract labor for many types of services, including nursing. As of 2018, about 16 percent of nurses in the United States were foreign nationals, mostly from the Philippines and other Asian countries.²⁰ Since 2017, healthcare workers from the Philippines have filed at least five federal class action forced labor lawsuits against staffing agencies that sponsored their visas and brought them to the United States.²¹ One plaintiff described arriving in the United States only to learn there was no position immediately available.²² Due to contract restrictions, she was unable to find other work to support herself while she waited weeks to begin. The staffing agency also required newly arrived recruits, including the plaintiff, to sign additional contracts in which the workers committed to repaying tens of thousands of dollars in “upfront costs” should they leave their job before working a certain number of hours.

Once the plaintiff’s job finally began, she was required to work up to 16-hour shifts, including mandatory overtime. Additionally, the agency paid her much less than U.S. citizen nurses, banned her from discussing working conditions, and required her to notify the agency when going out of town. Despite her long shifts, the staffing agency did not count many of those

¹⁷ List of Goods, *supra* note 12 at pp. 20-24

¹⁸ Sandler, S., et al., *Forced Labor in Surgical and Health care Supply Chains*, J AmColl Surg. (2018), <https://pubmed.ncbi.nlm.nih.gov/30336204/>

¹⁹ Forced Labor in China’s Xinjiang Region, U.S. Department of State (2021), <https://www.state.gov/forced-labor-in-chinas-xinjiang-region/>; see also Uighur Forced Labor & Xinjiang-based Medical Device Manufacturers, Symmetric Health Solutions (2021), <https://www.symmetrichealthsolutions.com/blog/uighur-forced-labor-xinjiang>

²⁰ Saenz, C., Harris, A., *Foreign Health-Care Workers Sidelined as Staffing Crisis Surges* (Bloomberg Law Nov. 19, 2021), <https://news.bloomberglaw.com/health-law-and-business/foreign-health-care-workers-sidelined-as-staffing-crisis-surges>

²¹ See *Paguirigan v. Prompt Nursing Employment Agency LLC et al.*, 1:17-CV-01302 (E.D.N.Y. Mar. 7, 2017); *The New York State Nurses Association v. Albany Medical Center*, 1:19-CV-01265 (N.D.N.Y. Oct. 15, 2019); *Carmen v. Health Carousel, LLC*, 1:20-CV-00313 (S.D. Ohio Apr. 20, 2020); *Magtoles et al. v. United Staffing Registry, Inc. et al.*, 1:21-CV-01850 (E.D.N.Y. Apr. 6, 2021); *Estravilla v. The Goodman Group, LLC et al.*, 9:21-CV-00068 (D. Mont. June 3, 2021)

²² Eidelson, J., *Nurses Who Faced Lawsuits for Quitting Are Fighting Back* (Bloomberg Businessweek Feb. 2, 2022) <https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back>

hours towards the total required to fulfill her contract. For example, mandatory overtime and three months of “orientation” did not count towards the total. Although desperate to leave her job, she stayed because she did not have enough money to pay the \$20,000 exit fee, and she faced legal action if she left without paying.

Courts have consistently found merit in this type of lawsuit, and in 2021, a federal judge ordered a number of staffing agencies to pay \$1.56 million to former employees for forced labor violations.²³

Statutory & Regulatory Framework

This section will provide an overview of the major U.S. laws and regulations that HPH sector organizations should understand for preventing and addressing forced labor in supply chains.²⁴

Trafficking Victims Protection Act

The Victims of Trafficking and Violence Protection Act (TVPA) of 2000 and its amendments provide the U.S. Government framework for addressing trafficking in persons, including forced labor.²⁵ Here, the IM will examine various forms of liability and risk that HPH sector organizations may encounter due to TVPA violations in their supply chains.

Criminal Liability

Chapter 77 of title 18 of the U.S. Code criminalizes all forms of trafficking in persons. When Congress passed TVPA, it added forced labor under 18 U.S. Code § 1589.²⁶

- **Section (a)** prohibits anyone from providing or obtaining labor or services by force, physical restraint, serious harm, abuse of law or legal process, threats, or any scheme “intended to cause the person to believe that...they would suffer serious harm or physical restraint.”
- **Section (b)** prohibits anyone from knowingly benefiting “from participation in a venture” that has engaged in forced labor.

The forced labor statute applies to all legal persons, including entities, which means HPH sector organizations are subject to criminal prosecution if they obtain or knowingly benefit from

²³ *Paguirigan v. Prompt Nursing Employment Agency LLC*, No. 17-cv-1302 (E.D.N.Y. 2021), available at <https://aboutblaw.com/XOv>

²⁴ Article 2 of the Forced Labour Convention sets the international definition of forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” More information about the international legal framework on forced labor is available here <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm>

²⁵ Trafficking Victims Protection Act, *supra* note 4

²⁶ Today, prosecutors file most forced labor cases under § 1589; however, Chapter 77 contains provisions predating the TVPA that criminalize specific types of forced labor, like peonage (§ 1581) and involuntary servitude (§ 1584).

forced labor. Notably, HHS is not aware that federal prosecutors have prosecuted any entity for forced labor under § 1589. However, contractors have been prosecuted in their individual capacity for forced labor, often in conjunction with fraud in foreign labor contracting or visa fraud charges.²⁷ Since 2000, only two percent of federal forced labor prosecutions are confirmed to have involved the HPH sector.²⁸

An entity convicted of § 1589 may be fined up to \$500,000 or twice the value conferred from the offense, and individuals may face up to 20 years in prison.²⁹ In addition to these penalties, defendants are required to pay victims restitution to cover the full amount of the victims' losses as determined by the court.³⁰ In making this determination, courts can consider medical expenses, the cost of therapy, lost income, attorneys' fees, and "any other relevant losses incurred by the victim," as well as "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under...the Fair Labor Standards Act."³¹

Civil Liability

18 U.S.C. § 1595 allows civil lawsuits to be brought for violations of § 1589 and other Chapter 77 provisions. In 2020, 7 percent of the 109 civil forced labor lawsuits filed in federal court involved the HPH sector. Victims and survivors have sued numerous corporations civilly for forced labor in supply chains.³² The legal standard for proving forced labor is lower in the civil context and plaintiffs have seen success, though the case law is still unsettled as to what extent organizations can be held accountable for forced labor in their supply chains abroad.³³

Immigration Consequences

Hospital administrators, procurement professionals, and others involved in HPH procurement decisions should understand potential immigration consequences for foreign national staff or contractors implicated in TVPA violations. The TVPA amended the Immigration and Nationality Act to make foreign nationals ineligible for visas or admission to the United States if they have "commit[ed] or conspire[d] to commit human trafficking offenses...or ha[ve] been a knowing

²⁷ 18 U.S.C. §§ 1351, 1546. See e.g., *United States v. Kartan*, No. 2:16-CR-00217-MCE, 2021 WL 168346 (E.D. Cal. Jan. 19, 2021); *United States v. Dan Zhong*, No. 16-CR-614 (DLI), 2018 WL 6176023 (E.D.N.Y. Nov. 26, 2018); *United States v. Yannai*, 791 F.3d 226 (2d Cir. 2015)

²⁸ Both were in long-term care facilities. Feehs, K., Currier Wheeler, A. 2020 Federal Human Trafficking Report (Human Trafficking Institute 2021), p. 57, <https://traffickinginstitute.org/wp-content/uploads/2022/01/2020-Federal-Human-Trafficking-Report-Low-Res.pdf>

²⁹ 18 U.S.C. §§, 1589, 3571

³⁰ 18 U.S.C. § 1593

³¹ 18 U.S.C. § 1593

³² 2020 Federal Human Trafficking Report, *supra* note 28 at p. 28

³³ For an overview of the current case law, see Roberson, L., Lee, J., *The Road to Recovery After Nestlé: Exploring TVPA as a Promising Tool for Corporate Accountability* (Columbia Human Rights Law Review Online 2021), available at <http://hrlr.law.columbia.edu/hrlr-online/the-road-to-recovery-after-nestle-exploring-tvpa-as-a-promising-tool-for-corporate-accountability/>

aider...in severe forms of trafficking in persons.”³⁴ Section 103 of TVPA categorizes forced labor as a “severe form of trafficking in persons” and defines it as:

*“the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”*³⁵

Notably, this definition differs from the criminal statute in that it includes “fraud” as a means of perpetrating forced labor. Accordingly, fraudulent recruitment practices or knowingly benefiting from such practices may carry ramifications for an individual’s immigration status even if it does not rise to the level of a crime under § 1589.

National Defense Authorization Act

HPH sector organizations that receive federal funding through contracts, grants, or cooperative agreements may be subject to Title XVII of the National Defense Authorization Act for Fiscal Year 2013 (NDAA)³⁶ and its implementing regulations. TVPA, as amended by NDAA, prohibits all government contractors, subcontractors, grantees, and subgrantees from engaging in or using “labor recruiters, brokers, or other agents who engage in” severe forms of trafficking in persons.³⁷

TVPA, as amended by NDAA, also prohibits “the use of forced labor in the performance of [a] grant, contract, or cooperative agreement” or “acts that directly support or advance trafficking in persons.” These acts include the following:

- Withholding identity or immigration documents;
- Failing to provide return transportation for foreign national employees;
- Engaging in materially fraudulent recruitment practices;
- Charging unreasonable recruitment fees; and
- Providing housing that does not meet relevant standards.³⁸

Reporting and Due Diligence

HPH sector organizations subject to Title XVII of NDAA are required to immediately report any credible information or allegations of forced labor or other prohibited activities by any employee or agent (including sub-awardees) to the Inspector General of the contracting agency. Subsequently, the reporting organization must fully cooperate with any audits,

³⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, § 222, Public Law 110-457, available at <https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1>; codified at 8 U.S.C. § 1182(a)(2)(H)(i)

³⁵ Codified at 22 U.S.C. § 7102. This section also provides definitions for debt bondage and involuntary servitude.

³⁶ Pub. Law 112-239, codified at 22 U.S.C. §§ 7104a-d

³⁷ 22 U.S.C. § 7104(g)

³⁸ 22 U.S.C. § 7104(g)

investigations, or corrective actions carried out by federal agencies in response to the reported alleged abuse.

Additional requirements apply to HPH sector organizations that have contracts worth more than \$550,000 for supplies not generally available on the commercial market.³⁹ These organizations must conduct due diligence and certify to their grant or contracting officer that no employees or agents (including sub-awardees) are engaged in forced labor or other prohibited activities. They must also:

- Implement a **compliance plan** to prevent forced labor and the other activities prohibited under Title XVII of NDAA; and
- Implement **procedures** to prevent, monitor, detect, and terminate any employee (including sub-awardees) engaged in forced labor or any of the other prohibited activities.

Regulations for Contractors

Section 22.17 of the Federal Acquisition Regulation (FAR), part of the Code of Federal Regulations (CFR), establishes minimum requirements for government contractors to meet when developing and implementing compliance plans and procedures.⁴⁰ The FAR also provides the exact language to be included in all government contracts to prohibit forced labor and guide compliance.⁴¹ Similarly, 2 CFR § 175 establishes minimum requirements for government grant recipients; however, these regulations have not been updated to incorporate NDAA compliance plan and procedure requirements.⁴²

Regulations for Grant Recipients

Grant or contracting officers for HPH sector organizations subject to Title XVII must report potential violations of Title XVII to the Inspector General of the contracting agency for investigation. If forced labor is found, potential remedial actions against the organization range from requiring termination of the employee involved or terminating the entire agreement, to suspension or debarment of the organization, which limits eligibility for future federal funding.⁴³ Notably, having and being in compliance with a compliance plan at the time of the violation is a mitigating factor that the contracting or grants officer may consider when ordering remedial actions. Conversely, failing to comply may be an aggravating factor. The Inspector General may also refer a report for criminal investigation.

³⁹ FAR 22.1703(c)

⁴⁰ <https://www.acquisition.gov/far/subpart-22.17>. E.O. 13333 granted State authority to initiate and amend FAR provisions implementing the TVPA, <https://www.federalregister.gov/documents/2004/03/23/04-6622/amending-executive-order-13257-to-implement-the-trafficking-victims-protection-reauthorization-act>

⁴¹ FAR 52.222-50 and 52.222-56

⁴² 2 CFR 175, <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-175>

⁴³ “Debarment removes a contractor’s eligibility for government contracts for a fixed period of time, while suspension temporarily debars a contractor for the duration of an agency investigation or litigation.” Manuel, K., *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (Congressional Research Service 2008), <https://sgp.fas.org/crs/misc/RL34753.pdf>

Tariff Act

It may be helpful for due diligence purposes that HPH sector organizations understand how the U.S. Government enforces forced labor laws against the products they procure from abroad. Since the Great Depression, the Tariff Act of 1930 has prohibited imports “mined, produced, or manufactured wholly or in part in any foreign country” by forced labor.⁴⁴ The Tariff Act is codified at 19 U.S.C. § 1307 and defines forced labor as:

“all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.”

Anyone can submit an import-related forced labor complaint to DHS.⁴⁵ U.S. Customs and Border Protection (CBP) within DHS investigates complaints and, if “information available reasonably but not conclusively indicates that merchandise [made with forced labor] is being, or is likely to be, imported,” CBP may issue a Withhold Release Order (WRO) to stop entry of the goods pending further investigation.⁴⁶ In recent years, CBP has issued many WROs against rubber gloves from Malaysia for abuses highlighted in the example above. A list of all WROs is available on CBP’s website.⁴⁷

If after 3 months CBP has **not made a determination**, the agency will inform the importer that the goods subject to the WRO are excluded from entry.⁴⁸ If, however, CBP determines the goods **have been made with forced labor**, the agency publishes this finding in the Federal Register, seizes the goods, and initiates forfeiture proceedings.⁴⁹ Importers may avoid both exclusion and seizure of goods by submitting satisfactory evidence that the goods were not made with forced labor.⁵⁰ These allegations may also be referred to DHS’s Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) for criminal investigation of the alleged forced labor in violation of 18 U.S.C. § 1589.

⁴⁴ Codified at 19 U.S.C. § 1307. “Section 910 of the Trade Facilitation and Trade Enforcement Act (TFTEA) of 2015, [Pub. L. No. 114-125 (2016),] enacted in February 2016, amended Section 307 [of the Tariff Act] by repealing a clause [known as the consumptive demand clause] that allowed the importation of certain forced labor–produced goods if they were not produced ‘in such quantities in the United States as to meet the consumptive demands of the United States.’” GAO Report (March 2021), p. 6, <https://www.gao.gov/assets/gao-21-259.pdf>. Repeal of the Consumptive Demand Clause made it possible for CBP to enforce section 307 against more foreign companies.

⁴⁵ To make a report, visit https://help.cbp.gov/s/complaints?language=en_US

⁴⁶ 19 CFR § 12.42(e)

⁴⁷ <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings>

⁴⁸ 19 CFR § 12.44(a)

⁴⁹ 19 CFR § 12.44(b)

⁵⁰ 19 CFR § 12.42(g)

Goods produced wholly or in part in North Korea⁵¹ or the Xinjiang Uyghur Autonomous Region of China and certain entities connected to Xinjiang,⁵² including PPE,⁵³ are presumed to be prohibited due to ongoing forced labor concerns (more on imports from Xinjiang below). Importers may overcome this presumption with “clear and convincing evidence” that the goods were not produced with forced labor.⁵⁴

Uyghur Forced Labor Prevention Act

The HPH Sector should be particularly diligent about medical devices and PPE manufactured in Xinjiang Autonomous Region of China (Xinjiang), as well as HPH products made with raw materials produced in Xinjiang, like cotton.⁵⁵ In 2021, Congress enacted the Uyghur Forced Labor Prevention Act (UFLPA), which went into effect on June 21, 2022.⁵⁶ Under this new law, CBP presumes imports from Xinjiang or companies on the UFLPA Entity List⁵⁷ are made with forced labor.

When CBP detains,⁵⁸ excludes,⁵⁹ or seizes⁶⁰ imports under the UFLPA, importers may rebut the presumption of forced labor and secure release of their products by complying with similar but separate procedures from those governing other imports subject to 19 U.S.C. § 1307. To successfully request an exception, importers must:⁶¹

- Fully comply with relevant guidance and regulations;
- “Completely and substantively” respond to all requests for information by CBP; and
- Demonstrate “by clear and convincing evidence” that no part of the import was mined, produced, or manufactured with forced labor.

An importer may also obtain release of an import by providing information to CBP that demonstrates the import is outside the UFLPA’s scope (i.e., the import was wholly produced outside Xinjiang without connection to companies on the UFLPA Entity List).

For guidance on the type of information that may be required to satisfy these requirements, importers may reference the *Strategy to Prevent the Importation of Goods Mined, Produced, or*

⁵¹ 22 U.S.C. § 9241a

⁵² Uyghur Forced Labor Prevention Act, § 3, Pub. Law 117-78 (2021), <https://www.congress.gov/bill/117th-congress/house-bill/6256/text>; codified at 22 U.S.C. § 6901 note; section 2(d)(2)(B) of the UFLPA mandated the Forced Labor Enforcement Task Force to compile this list, available at <https://www.dhs.gov/uflpa-entity-list>

⁵³ Pattison, P. & Kelly, A., *UK Sourced PPE from Factories Secretly Using North Korean Slave Labour* (The Guardian Nov. 20, 2020), https://www.theguardian.com/global-development/2020/nov/20/uk-sourced-ppe-from-factories-secretly-using-north-korean-slave-labour?CMP=Share_AndroidApp_Other

⁵⁴ 22 U.S.C. §§ 9241a, 6901 note

⁵⁵ Uyghur Forced Labor & Xinjiang-based Medical Device Manufacturers, *supra* note 19

⁵⁶ UFLPA, *supra* note 51

⁵⁷ <https://www.dhs.gov/uflpa-entity-list>

⁵⁸ 19 U.S.C. § 1499; 19 CFR § 151.16; 19 CFR § 151

⁵⁹ 19 U.S.C. § 1514; 19 CFR § 174

⁶⁰ 19 U.S.C. § 1595a; 19 CFR § 171

⁶¹ UFLPA § 3(b)

*Manufactured with Forced Labor in the People's Republic of China*⁶² and *UFLPA Operational Guidance for Importers*.⁶³ HPH Sector procurement professionals should stay up to date on any new guidance and regulations as the UFLPA enforcement framework develops.

Statutory Tools for Due Diligence

There are several statutorily mandated tools of the U.S. Government that may be used by HPH sector organizations in furtherance of due diligence efforts. When making procurement decisions, it is good practice for HPH sector organizations to be mindful of the DOL's lists of goods produced with child labor and forced labor, cross-referenced with tier placement of the countries originating products and services, and relevant WROs, findings, and sanctions.

Lists of Goods and Products

The Trafficking Victims Protection Act of 2005 and subsequent reauthorizations require DOL to publish a "list of goods from countries that [DOL] has reason to believe are produced by forced labor or child labor in violation of international standards, including...goods that are produced with inputs that are produced with forced labor or child labor."⁶⁴ Accordingly, DOL produces two lists:

- List of Goods Produced by Child Labor or Forced Labor⁶⁵
- List of Products Produced by Forced or Indentured Child Labor⁶⁶

DHS guidance recommends importers review these lists to satisfy their obligation under 19 U.S.C. § 1484 to use "reasonable care" in ensuring all legal requirements have been met when importing merchandise.⁶⁷ In fact, pursuant to Executive Order 13126, *Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor*, FAR 22.1503 mandates that certain government contractors check the DOL's *List of Products Produced by Forced or Indentured Child Labor* when issuing a solicitation for supplies and regulates procurement of such items. Federal contractors who supply products on the list must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items supplied.⁶⁸

⁶² Report to Congress, U.S. Department of Homeland Security (2022), https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf

⁶³ U.S. Customs and Border protection (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf

⁶⁴ Pub. Law 109-164 (2006), <https://www.congress.gov/bill/109th-congress/house-bill/972/text>; codified at 22 U.S.C. § 7112

⁶⁵ <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>

⁶⁶ List of Products Produced by forced or Indentured Child Labor, <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-products>

⁶⁷ https://www.cbp.gov/trade/programs-administration/forced-labor/frequently-asked-questions?language_content_entity=en

⁶⁸ FAR 22.1503

Tier Rankings

Further, § 110 of TVPA and its amendments charge the U.S. Department of State (State) with publishing the annual Trafficking in Persons Report,⁶⁹ which ranks countries on their compliance with minimum standards, including:

“measures to prevent the use of forced labor or child labor in violation of international standards...and effective policies or laws regulating foreign labor recruiters and holding them civilly and criminally liable for fraudulent recruiting.”⁷⁰

Indeed, forced labor risks in recruitment practices and supply chains, and efforts to mitigate risks, are factors State weighs in assigning each country’s tier placement, which carries non-humanitarian, non-trade sanctions implications for countries on Tier 3.⁷¹

Sanctions Programs

TVPA also authorizes the President to invoke sanctions against individuals and entities.⁷² The sanctions available under this section include those established by the Global Magnitsky Human Rights Accountability Act, to target “[a]ny foreign person that plays a significant role in a severe form of trafficking in persons, directly or indirectly in the United States.”⁷³ The sanctions provided under this section are:

- inadmissibility to the United States in accordance with section 221(i) of the Immigration and Nationality Act;⁷⁴ and
- frozen assets in accordance with the International Emergency Economic Powers Act.⁷⁵

U.S. Department of the Treasury’s (Treasury) Office for Foreign Assets Control (OFAC) has levied Global Magnitsky sanctions against North Korea’s Central Public Prosecutor’s Office and former Minister of Social Security for forced labor in prison camps,⁷⁶ as well as the entity Xinjiang Production and Construction Corps for forced labor in the Xinjiang Uyghur Autonomous Region.⁷⁷ OFAC also implements sanctions programs targeting forced labor under the authority of executive orders and laws beyond the TVPA.⁷⁸

⁶⁹ 22 U.S.C. § 7112

⁷⁰ 22 U.S.C. § 7106(b)(3)

⁷¹ 22 U.S.C. § 7107

⁷² Pub. Law 115-425 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/2200/text>

⁷³ 22 U.S.C. § 7108(a)(1)(A). In April 2022, Congress enacted the Suspending Normal Trade Relations with Russia and Belarus Act, Pub. Law 117-110 (2022), which repealed the sunset provision on the Global Magnitsky Human Rights sanctions program under § 6. <https://www.congress.gov/bill/117th-congress/house-bill/7108/text>

⁷⁴ 8 U.S.C. § 1201(i)

⁷⁵ 50 U.S.C. § 1701 et seq.

⁷⁶ Press Release, *Treasury Sanctions Perpetrators of Serious Human Rights Abuse on International Human Rights Day* (Treasury Dec. 10, 2021), <https://home.treasury.gov/news/press-releases/jy0526>

⁷⁷ Press Release, *Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order* (Treasury July 21, 2020), <https://home.treasury.gov/news/press-releases/sm1073>

⁷⁸ For a list of examples, visit <https://home.treasury.gov/news/featured-stories/combating-human-trafficking>

Finally, the Countering America's Adversaries Through Sanctions Act⁷⁹ established a separate sanctions program for foreign nationals employing North Korean labor (which is presumed to be forced labor, as discussed above). Any foreign national "that knowingly employ[s] North Korean laborers" may be subject to sanctions pursuant to the International Emergency Economic Powers Act, which block and prohibit the individual's property transactions and interests within U.S. control.⁸⁰ The foreign national may receive an exception to sanctions by providing reliable information to OFAC that:

- Employing North Korean laborers does not, in this instance, result in value to the North Korean Government;
- All wages and benefits are provided directly to the laborers; and
- The working conditions meet international standards.

Other Laws Addressing Forced Labor in Supply Chains

The following section outlines a number of other federal laws that make up the broader enforcement framework addressing forced labor in supply chains.

Export Control Reform Act

In addition to import regulations under the Tariff Act, the U.S. Government combats forced labor in supply chains through *export* regulations. These regulations may affect HPH sector organizations that produce products in the United States to sell abroad. The Export Control Reform Act of 2018 (ECRA)⁸¹ authorizes the Department of Commerce's Bureau of Industry and Security (BIS) to implement the Export Administration Regulations (EAR). Under ECRA § 2(D), BIS controls exports to, *inter alia*, "carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy." These human rights considerations are codified in section 15 CFR § 742.7 of the EAR. Under this section, BIS may deny export licenses for most controlled items "if BIS assesses that there is a risk that the items will be used in a violation or abuse of human rights."⁸² BIS has used forced labor concerns as grounds to exercise this authority,⁸³ including denying licenses for exporting items to several Chinese companies with ties to the Xinjiang Uyghur Autonomous Region.⁸⁴

Bank Secrecy Act

Congress passed the Bank Secrecy Act (BSA)⁸⁵ in 1970 to combat money laundering with the help of U.S. financial institutions. Amended most recently by the Anti-Money Laundering Act of 2020, the BSA aids in the prevention of money laundering, terrorism financing, and other illicit

⁷⁹ CAATSA, *supra* note 50

⁸⁰ CAATSA, *supra* note 50 at § 321(b); codified at 22 U.S.C. § 9241b

⁸¹ 50 U.S.C. §§ 4801-4826; 4813(a)(15); see also 15 CFR § 758.7

⁸² <https://www.federalregister.gov/documents/2020/10/06/2020-21815/amendment-to-licensing-policy-for-items-controlled-for-crime-control-reasons>, codified at 14 CFR § 742

⁸³ A complete list is available here: <https://www.bis.doc.gov/index.php/human-rights>

⁸⁴ 15 CFR § 742

⁸⁵ 31 U.S.C. § 5311. The BSA is sometimes referred to as the Currency and Foreign Transactions Reporting Act or the anti-money laundering law (AML).

financial activity.⁸⁶ Money laundering always occurs in furtherance of another crime or “predicate offense,” and trafficking in persons—including forced labor—is one predicate offense for money laundering.⁸⁷ Pursuant to the BSA’s implementing regulations, if a financial institution identifies financial activity that may be linked to forced labor, it must submit a Suspicious Activity Report (SAR) to Treasury’s Financial Crimes Enforcement Network (FinCEN).⁸⁸ Treasury then uses the SAR to identify trends, develop intelligence information on money laundering and terrorist financing, and recommend suspected criminals for further investigation by relevant law enforcement agencies. Section 314(b) of the USA PATRIOT Act encourages financial institutions to share information with each other when evaluating transactions that may be related to money laundering, including those instances involving forced labor.⁸⁹ Financial investigations can identify entities directly or indirectly involved in forced labor through the global supply chain.⁹⁰ HPH sector organizations can assist these efforts by cooperating with federal investigations when financial activity indicates fraudulent recruitment schemes may be taking place in their supply chains.

Policy Guidance and Resources

Additional Executive Authorities Related to Forced Labor in Supply Chains

Executive Orders

- Executive Order (EO) 13627: Strengthening Protections Against Trafficking in Persons in Federal Contracts (2012)⁹¹
- EO 14001: Sustainable Public Health Supply Chain (2021)⁹²
- EO 14017: America’s Supply Chains (2021)⁹³

Business Advisories

- North Korea Sanctions & Enforcement Actions Advisory: Risks for Businesses with Supply Chain Links to North Korea (2018)⁹⁴

⁸⁶ The Anti-Money Laundering Act was enacted as Division F, Section 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. Law (2021), <https://www.congress.gov/bill/116th-congress/house-bill/6395/text>

⁸⁷ 18 U.S.C. § 1956(c)(7)(A), (B)(vii)

⁸⁸ 31 U.S.C. § 5311, note; 31 CFR § 1020.320; 31 CFR § 1021.320; 31 CFR § 1022.320; 31 CFR § 1023.320; 31 CFR § 1024.320; 31 CFR § 1025.320; 31 CFR § 1026.320; 31 CFR § 1029.320; 31 CFR § 1030.320.

⁸⁹ Pub. Law 107-56, § 314(b); 31 CFR § 1010.540

⁹⁰ *Financial Flows from Human Trafficking* (Financial Action Task Force 2018), p. 58, <https://www.fatf-gafi.org/media/fatf/content/images/Human-Trafficking-2018.pdf>

⁹¹ <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>

⁹² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/>

⁹³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/>

⁹⁴ https://home.treasury.gov/system/files/126/dprk_supplychain_advisory_07232018.pdf

- Xinjiang Supply Chain Business Advisory: Risks and Considerations for Businesses and Individuals with Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses linked to Xinjiang, China (2021)⁹⁵

Other

- Office of Management and Budget Memorandum on Anti-Trafficking Risk Management Best Practices and Mitigation Considerations (2019)⁹⁶
- National Action Plan on Responsible Business Conduct (forthcoming)⁹⁷

Additional Resources for Addressing Forced Labor in Supply Chains

U.S. Government Resources

- Better Trade Tool (DOL)⁹⁸
- Comply Chain: Business Tools for Labor Compliance in Global Supply Chains (DOL)⁹⁹
- FinCEN Advisory: Guidance on Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking – Financial Red Flags (Treasury)¹⁰⁰
- FinCEN Advisory: Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity¹⁰¹
- Office of the United States Trade Representative Website¹⁰²
- Responsible Care: An Informed Compliance Publication (DHS)¹⁰³
- Responsible Sourcing Tool (State)¹⁰⁴
- Sweat & Toil: Child Labor, Forced Labor, and Human Trafficking Around the World (DOL)¹⁰⁵
- The U.S. Department of Justice’s Human Trafficking Webpage¹⁰⁶

Multilateral Resources

- Combating Forced Labour: A Handbook for Employers and Business (ILO)¹⁰⁷

⁹⁵ <https://www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021-1.pdf>

⁹⁶ <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-01.pdf>

⁹⁷ <https://www.state.gov/responsible-business-conduct-national-action-plan/>

⁹⁸ <https://www.dol.gov/agencies/ilab/better-trade-tool>

⁹⁹ <https://www.dol.gov/general/apps/ilab-comply-chain>

¹⁰⁰ <https://www.fincen.gov/sites/default/files/advisory/FIN-2014-A008.pdf>

¹⁰¹ https://www.fincen.gov/sites/default/files/advisory/2020-10-15/Advisory%20Human%20Trafficking%20508%20FINAL_0.pdf

¹⁰² <https://ustr.gov/>. HPH sector organizations may strengthen their due diligence by monitoring what countries are subject to forced labor provisions in trade agreements or participating in preference programs.

¹⁰³ <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icprescare2017revision.pdf>

¹⁰⁴ <https://www.responsiblesourcingtool.org/>

¹⁰⁵ <https://www.dol.gov/general/apps/ilab>

¹⁰⁶ <https://www.justice.gov/humantrafficking>. This webpage links to DOJ’s *National Strategy to Combat Human Trafficking* and the Attorney General’s *Trafficking in Persons Reports*.

¹⁰⁷ https://www.ilo.org/global/topics/forced-labour/publications/WCMS_101171/lang--en/index.htm

- Gender Dimensions of the Guiding Principles of Business and Human Rights (OHCHR)¹⁰⁸
- General principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs (ILO)¹⁰⁹
- Guidelines Concerning the Measurement of Forced Labor (ILO)¹¹⁰
- Guidelines for Multinational Enterprises (OECD)¹¹¹
- Guiding Principles on Business and Human Rights (OHCHR)¹¹²
- Improving Employment and Working Conditions in Health Services (ILO)¹¹³
- IRIS Ethical Recruitment Standard (IOM)¹¹⁴
- The Corporate Responsibility to Protect Human Rights (OHCHR)¹¹⁵
- Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO)¹¹⁶

Resources from Federal Grant Recipients or Congressional Hearings

- Commodity Atlas (Verité)¹¹⁷
- Fair Hiring Toolkit (Verité)¹¹⁸
- How can I manage the risk of modern slavery in my supply chain? GFEMS highlights three promising forced labor risk detection tools. (GFEMS)¹¹⁹
- Importing Freedom (HTLC)¹²⁰
- Promoting Responsible Recovery: Detecting, Mitigating, & Remediating Modern Slavery in Supply Chains (GFEMS)¹²¹

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<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf>

¹⁰⁹ https://www.ilo.org/global/topics/labour-migration/publications/WCMS_536755/lang-en/index.htm

¹¹⁰ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648619.pdf

¹¹¹ <https://www.oecd.org/corporate/mne/>

¹¹² https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹¹³ https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_548288.pdf

¹¹⁴ <https://iris.iom.int/iris-standard>

¹¹⁵ https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_EN.pdf

¹¹⁶ https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

¹¹⁷ <https://www.verite.org/commodity-atlas/>

¹¹⁸ <https://www.verite.org/help-wanted/>

¹¹⁹ https://www.gfems.org/wp-content/uploads/2021/11/21.10.22_GFEMS_Supply-Chain-Tools.pdf

¹²⁰ https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf

¹²¹ Briefing 1: https://www.gfems.org/wp-content/uploads/2021/06/GFEMSWebBooklet1_Final.pdf; Briefing 2: <https://www.gfems.org/wp-content/uploads/2021/06/GFEMSWebBooklet2.pdf>; Briefing 3: <https://www.gfems.org/wp-content/uploads/2021/06/GFEMSWebBooklet3.pdf>; Briefing 4: https://www.gfems.org/wp-content/uploads/2021/06/GFEMSWebBooklet4_Revised_Final.pdf; Briefing 5: <https://www.gfems.org/wp-content/uploads/2021/06/GFEMSWebBooklet5Final.pdf>

For More on Forced Labor and the HPH Sector

- Forced Labor in Surgical Healthcare Supply Chains (Journal of American College of Surgeons)¹²²
- Mitigating Labor Trafficking in Public Health Supply Chains (OTIP)¹²³

_____/s/_____
Katherine Chon
Director

¹²² <https://healtrafficking.org/2020/03/forced-labor-in-surgical-and-health-care-supply-chains/>

¹²³ <https://www.acf.hhs.gov/blog/2021/10/mitigating-labor-trafficking-public-health-supply-chains>