

# **RESPONSIBLE LABOR REPORT: 2022–2023**

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## RESPONSIBLE LABOR REPORT: 2022–2023

The prevention of forced labor in the global supply chain has been elevated in visibility and consequence over the last several years. In 2022, the emphasis focused largely, though not exclusively, on trade remedies. The United States enacted the Uyghur Forced Labor Prevention Act, the European Union proposed a ban on imports made with forced labor, and the United Kingdom proposed updates to the Modern Slavery Act. Outside of trade, litigation alleging claims of misrepresentation is pending in the US courts, and in the EU there are multiple investigations into allegations of forced labor in the fashion retail supply chain.

Allegations of forced labor are not confined to China's Xinjiang province—the focus of US legislation—but much of the recent attention has been directed toward China. China denies the allegations of forced labor and vows to respond, using the legislative tools it has developed in the last several years.

This report provides a summary of forced labor developments from 2022 and discusses what to watch for in 2023.

## UNITED STATES

### Legislative Activity: Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act (UFLPA) took effect on June 21, 2022, creating a rebuttable presumption that any goods that were mined, produced, or manufactured, wholly or in part, in the Xinjiang Uyghur Autonomous Region (XUAR), were made with forced labor and barring their importation into the United States.

US Customs and Border Protection (CBP) released its complementary [Operational Guidance for Importers](#) on June 13, 2022, to facilitate implementation of the rebuttable presumption. CBP's [Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China](#) was delivered to the US Congress on June 21, 2022. Alongside the strategy, CBP also published the [UFLPA Entity List](#), which identifies entities in the XUAR that mine, produce, or manufacture, wholly or in part, any goods, wares, articles, and merchandise with forced labor.

For more information on how to prepare and respond, please refer to our LawFlash, [Uyghur Forced Labor Prevention Act Takes Effect in United States](#).

### *Activity to Date*

While there has not been much concrete information, a *Risk & Compliance Journal* interview (excerpted in *The Wall Street Journal*) with Robert Silvers, a US Department of Homeland Security undersecretary who chairs the interagency Forced Labor Enforcement Task Force, sheds some light on how the US government is viewing the UFLPA: "We are committing a lot of resources to this. At present, this is a high commitment area, a high priority area."

UFLPA enforcement is in the spotlight. The article notes that CBP has "already targeted 1,452 cargo entries valued at \$429 million under the new law." Regarding the support from Congress mentioned by Undersecretary Silvers, both the House and Senate Appropriations Committees recommend dedicating nearly \$90 million for UFLPA enforcement in FY2023, including \$17 million for an advanced trade analytics platform.

Mr. Silvers, speaking at a Wall Street Journal program, noted that they are exploring technology solutions to identify imports associated with forced labor in Xinjiang, including the use of DNA testing on clothing

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to identify the origin of cotton. He also referenced the Customs Trade Partnership Against Terrorism eligibility that now includes a forced labor requirement and said they will prioritize inspecting relevant shipments from those importers.

## **Legislative Activity: NY Fashion Sustainability Act**

The New York Fashion Sustainability and Social Accountability Act (S7428/A8352), if passed by the state legislature, would be the first fashion sustainability law in the United States. The bill, introduced in the New York state legislature in October 2021 and referred to committee in January 2022, remains pending. The legislation seeks to amend the New York General Business Law to require fashion manufacturers and retail sellers that do business in New York State and have annual worldwide gross receipts exceeding \$100 million to disclose their environmental and social due diligence policies, processes, and outcomes on their websites.

In addition to penalties of up to 2% of their annual revenues (to be deposited in a newly established community benefit fund administered by the New York State Department of Environmental Conservation), the bill also authorizes a private right of action (1) against any person alleged to have violated the law or an order by the attorney general relating to the standards and requirements of the law; (2) to compel the attorney general to investigate an entity's compliance, enforce compliance, or apply prohibitions to a business operating in the state; or (3) against the attorney general for an alleged failure to perform any nondiscretionary act or duty under the law.

For more on the act, please read our LawFlash, [New York Fashion Sustainability Act Would Affect Most Major Brands](#).

## **Litigation**

Three types of claims have accounted for most of the litigation filed over allegations of forced labor against corporate entities.

The Alien Tort Statute (ATS), which provides federal courts jurisdiction to hear claims brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," was largely defanged with the 2021 [Nestle/Carqill decision](#) in the US Supreme Court.

In August 2022, former workers at a Malaysian rubber-glove maker alleged violations of the Trafficking Victims Protection Reauthorization Act (TVPRA), which imposes liability on companies that knowingly benefit from participation in a venture engaged in forced labor, in a class action lawsuit in the District Court for the District of Columbia.

Consumer claims have been asserted under the California Consumers Legal Remedies Act (CLRA) and California's Unfair Competition Law (UCL) in a suit against Starbucks regarding a statement of "made with ethically sourced cocoa" on hot chocolate packets. Nestle is facing similar claims in the US District Court for the Southern District of California.

We also have seen litigation adverse to the US government challenging placement on the "entity list" due to allegations of forced labor. The Esquel Group, a Hong Kong-based textile and apparel manufacturer, sued the US Department of Commerce to secure relief from the "economic and reputational harms" caused by the listing, but a US federal judge refused to lift the trade restrictions. The case is still pending.

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## UNITED KINGDOM

### Legislation: Modern Slavery Act

Under Section 54 of the [UK Modern Slavery Act 2015](#) (MSA), certain businesses are required to publish a “slavery and human trafficking statement” for each financial year of the organization, outlining measures they have taken to identify and address the risks of modern slavery in their supply chains and in any part of their own business. The Section 54 obligation applies to large commercial organizations that carry on business in the United Kingdom and have a total turnover of £36 million or more. It also applies to organizations based outside the UK but selling goods and services into the UK. The government encourages the publication of the statement on its [modern slavery statement registry](#), launched by the UK Home Office on February 23, 2021, but a legislative change to make this compulsory is expected. Since the launch of the registry, it appears that more than 32,000 statements have been filed.

There are currently no fines or penalties for failing to prepare or publish a modern slavery and human trafficking statement under the MSA. However, the secretary of state has the power to bring civil proceedings in the High Court for an injunction requiring an organization to comply with the disclosure requirement. A subsequent failure to comply with any court order to publish a statement would potentially constitute contempt of court, punishable by an unlimited fine.

As part of proposed legislative changes, the UK government is also planning to introduce fines for organizations that fail to comply with Section 54, as discussed in Updates to the MSA below.

Negative attention from the UK's independent anti-slavery commissioner, investors, shareholders, customers, trade unions, and civil society, such as nongovernmental organizations and human rights groups, can affect a noncompliant organization's reputation and share value, particularly if the organization or sector is already in focus for labor and supply chain issues. Incorrect, misleading, or deficient statements may give rise to claims in misrepresentation, tort, or securities actions under Section 90 and 90A of the UK Financial Services and Markets Act 2000.

However, lack of enforcement of the MSA has been widely criticized. While the disruption caused by Brexit and the global pandemic have been in part to blame, there is a general understanding that the law does not have the tools to be effective in enforcement.

In recognition of the COVID-19 pandemic, the Home Office had published guidance on modern slavery reporting during the coronavirus (COVID-19) pandemic (20 April 2020), which has now been withdrawn and is no longer accessible from the Home Office website. The guidance recognized that the challenges of the pandemic (for example, reduced staff capacity) may have meant that some businesses were unable to publish their slavery and human trafficking statements under Section 54 of the MSA within the usual timeframe. (The usual timeframe for publication is as soon as possible after an entity's financial year end, and at most, within six months thereafter.) The Home Office stated that a business that had to delay the publication of its modern slavery statement by up to six months due to COVID-related pressures would not be penalized, but that it should state the reason for any delay in its statement.

### Updates to the MSA

Proposed [amendments to the MSA](#) were introduced into the [House of Lords on June 15, 2021](#):

- Introduction of a criminal offense for supply of a false modern slavery statement. Punishable with imprisonment and/or a fine of 4% of the organization's global turnover, subject to a cap of £20 million (\$24.3 million).

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- Introduction of a criminal offense for continuing to source from supply chain entities where the anti-slavery commissioner has issued a formal warning with respect to demonstrating minimum standards of transparency. Punishable with a fine of 4% of the organization's global turnover, subject to a cap of £20 million (\$24.3 million).
- An increase in the transparency standards that organizations are expected to attain, including the requirement to publish and verify information about the country of origin of sourcing inputs in its supply chain.

In addition, there is a proposal to require organizations to conduct a risk assessment that is renewed each year and then to declare their confidence that their supply chain is free of forced labor.

On May 10, 2022, the [Queen's Speech](#) outlined the provisions of the proposed Modern Slavery Bill, which would (among other things) mandate areas to be covered in modern slavery statements; require them to be published on a government-run registry, and introduce civil penalties for noncompliance. Together with the other reforms to Section 54, the introduction of financial penalties will be legislated for when parliamentary time allows. However, plans have been stalled to give a single enforcement body powers to impose financial penalties against noncompliant organizations.

## EUROPEAN UNION

In July 2021, the European Commission and European External Action Service issued [Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labor in Their Operations and Supply Chains](#).

On September 14, 2022, the Commission adopted a proposal for a regulation banning products made with forced labor on the EU market. The regulation will apply to any product made available on the market by an economic operator. The prohibition covers domestically produced (for export or not) and imported products, including their components, without targeting specific companies or industries.

The timeline for the final adoption is still unclear, but an approximate entry into force could be estimated as 2025.

For more details, please see our LawFlash, [Recent EU Initiatives Focus on Sustainability, Forced Labor](#).

## CHINA

### Potential Regulatory Restrictions Under Chinese Law

The Chinese government strongly opposes and categorically denies the XUAR forced labor accusations and has vowed to respond strongly to the enforcement of the United States' UFLPA, including by the imposition of countersanctions.

China has developed tools including the blocking statute, enacted in 2021, which allows China's Ministry of Commerce (MOFCOM) to nullify "unjustifiable" foreign sanctions that impose restrictions on trade activities between Chinese persons and a third state or its persons, and further allows Chinese persons to bring private lawsuits in China to claim damages against any person complying with those banned foreign sanctions (such as multinational companies terminating or refusing to do business with a Chinese supplier due to risks of noncompliance with the UFLPA).

In addition, the Anti-Foreign Sanctions Law (AFSL) expressly prohibits "aiding and abetting" the enforcement of any type of foreign sanctions as long as they are deemed by the Chinese government as

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aiming to “constrain or suppress” China by employing “discriminatory restrictive measures” against Chinese persons and organizations or to “interfere with China’s internal affairs.”

In preparing to comply with the UFLPA, multinational companies are well advised to carefully evaluate the risks of potential countersanctions imposed by the Chinese government against such companies and their employees, and to develop strategies to mitigate such risks, including careful evaluation of communication strategies.

## WHAT TO WATCH

### United States

With Democrats maintaining control of the Senate and Republicans holding a tenuous majority in the House, it is likely that the 118th Congress will struggle to pass legislation. With that said, there remains a bicameral, bipartisan focus on US-China policy as well as a desire to review aspects of the countries’ economic relationship, including issues pertaining to forced labor and human rights concerns, which may result in calls for more aggressive enforcement of the UFLPA.

The US solar energy industry reportedly has been impacted by the trade restrictions. According to a January 2023 [Axios report](#), CBP officials have seized around \$1.3 billion worth of imports since the UFLPA went into effect in June 2022, the majority of which were solar panels.

For more, please see our blog post, [How Responsible Labor and Trade Issues Affect the Solar Energy Industry](#).

Additionally, there will continue to be congressional inquiries, like the one led by Senate Finance Committee Chairman Ron Wyden (D-OR) in late 2022. The committee recently issued a report on its inquiries to automakers concerning forced labor issues in Xinjiang, China. The committee’s [release](#) cited a [research report](#) on forced labor connections to the global automotive supply chain and included letters sent to eight “major” automakers. Next steps in this line of inquiry should develop in the first quarter of 2023.

While the politics and process play out, companies need to consider how they address statements on forced labor, from both reputational and legal risk perspectives. Public companies face additional risks in their forced labor compliance statements and as they disclose risk factors in their public filings.

For more, please see our LawFlash, [Issuers Should Review Risk Factor Disclosures Amid US–China Tensions](#).

### United Kingdom

Proposed updates to the MSA will be the focal point for developments in the United Kingdom. In addition, it bears noting that class and group actions are on the rise in the UK and could be a vehicle for bringing consumer claims related to forced labor in consumer goods. Litigation funders are helping to fuel the growth of these actions.

On January 20, 2023, the UK High Court issued a ruling in a case brought by the World Uyghur Congress, a nongovernmental organization, alleging that the UK Home Secretary, HM Revenue and Customs, and National Crime Agency (NCA) had failed to investigate potential breaches of the Foreign Prison-Made Goods Act 1897 and failed to launch a money laundering probe or start civil confiscation processes under the Proceeds of Crime Act 2002 (POCA).

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The judge ultimately refused the relief sought, but said it was clear that “these agreed concerns continue to trouble the Defendant and are the subject of active policy work and engagement,” and that there “may be other tools or measures available to the executive and law enforcement agencies, or other evidence which they could receive meeting the requirements . . . which could provide an effective basis for tackling the concerns in respect of cotton production in the XUAR.”

The NCA accepted the lobby group’s argument that a company could hypothetically be pursued under the POCA, and indicated a willingness to investigate companies that import goods made or assembled by forced labor on the grounds that those products may constitute the proceeds of crime.

For more details, please see our LawFlash, [The UK’s NCA May Investigate Cotton Imports Linked to Modern Slavery](#).

## European Union

The proposed ban in the EU market of products made with forced labor would not take effect until 2025. In 2023, the EU Directive on Collective Redress may be a larger factor, as all member states are required to change their national civil procedure rules to allow qualified entries to file collective actions on behalf of consumers by December 25, 2022. Litigation funders could also play a role here.

## HOW WE CAN HELP

Morgan Lewis assists organizations with third-party risks, including helping to ensure responsible labor in their supply chains and navigating the conflict of laws between the United States and China. Our cross-disciplinary global team works collaboratively to advise clients regarding compliance with legislation and trade policies and to represent them in contentious governmental agency proceedings.

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## **APPENDIX A**

### **SELECTED MORGAN LEWIS REFERENCES**

[Uyghur Forced Labor Prevention Act Takes Effect in United States](#)

[New York Fashion Sustainability Act Would Affect Most Major Brands](#)

[Recent EU Initiatives Focus on Sustainability, Forced Labor](#)

[Issuers Should Review Risk Factor Disclosures Amid US–China Tensions](#)

[The UK’s NCA May Investigate Cotton Imports Linked to Modern Slavery](#)