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## WHITE PAPER

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### Global Spotlight on Labor Trafficking in Health Care and Corporate Supply Chains

Courts and legislatures both in the United States and abroad continue to prioritize the eradication of labor trafficking in corporate supply chains, including those in the health care industry. For example, in the United States, consumers have sued manufacturers for failing to disclose the presence of forced labor in their supply chains. These claims have been based on consumer protection laws, the Alien Tort Statute, and the Trafficking Victims Protection Reauthorization Act. The United States government has also used enforcement power through the use of withhold release orders to prevent the import of goods into the United States that the government believes to have been made with forced labor.

In addition, the COVID-19 pandemic has both highlighted and exacerbated labor-trafficking issues worldwide, particularly in industries related to pandemic response. This development has had a particular focus on the health care industry.

Outside the United States, numerous countries are taking differing strategies to combat labor trafficking. Some countries are focusing their efforts on effecting change downstream by requiring companies to meet reporting and/or supply chain due diligence obligations, whereas other countries, in contrast, target those who actually recruit and/or provide labor. These countries' efforts reflect an increased global interest and effort in developing greater protections for workers and eliminating exploitative business practices across the globe.

This Jones Day *White Paper* serves as an update to our prior publications regarding legislation and executive action aimed at curbing forced labor in supply chains, with an additional focus on the effect of the COVID-19 pandemic. This *White Paper* sets forth developments in the areas of: (i) litigation within the United States; (ii) the effect of the COVID-19 pandemic on labor trafficking; and (iii) international efforts to eradicate labor trafficking worldwide.

## FIGHTING LABOR TRAFFICKING IN THE COURTS: U.S. LITIGATION

### Civil Actions

In general, the Alien Tort Statute (“ATS”) 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.”<sup>1</sup> In the line of cases utilizing the ATS, the most significant update is the Supreme Court’s 2021 decision in *Nestlé USA v. Doe*, resolving a circuit split on the reach of the statute.<sup>2</sup> In that case, six children from Mali were allegedly trafficked into Ivory Coast and forced to work cultivating cocoa beans.<sup>3</sup> The individuals sued Nestle under the ATS for aiding and abetting their traffickers, as the U.S. corporation purchased cocoa from farms in Ivory Coast.<sup>4</sup> The Supreme Court ultimately ruled in favor of Nestle, finding that the individuals improperly sought “extraterritorial application of the ATS” because the conduct that formed the basis of their claim under the ATS must have occurred in the United States, but in that case, “nearly all the conduct they allege aided and abetted forced labor—providing training, equipment, and cash to oversees farmers—occurred in Ivory Coast.”<sup>5</sup> The plaintiffs argued that the corporate presence of Nestle in the United States was sufficient to show a proper basis for the ATS claim, but the court disagreed. As a result, victims of labor trafficking must show more domestic conduct than “general corporate activity” common to most corporations within the United States in order to utilize the ATS.<sup>6</sup>

Labor-trafficking claims brought under theories of consumer protection law violations have developed with some success at the district court level. Most notably, a California district court ruled in 2021 that consumers sufficiently stated claim against Starbucks in a forced labor suit under the California Consumers Legal Remedies Act (“CLRA”) and California’s Unfair Competition Law (“UCL”).<sup>7</sup> Specifically, the court found that Starbucks’s statement of “made with ethically sourced cocoa” on hot chocolate packets may be misleading because “it is difficult or impossible to produce chocolate without labor from child slaves,” making it likely that Starbucks uses chocolate produced with child forced labor—a practice that a reasonable consumer would not consider to be ethical.<sup>8</sup>

Since the last update, circuit and district courts have also considered claims alleging violations of the Trafficking Victims Protection Reauthorization Act (“TVPPRA”), which imposes

liability on companies that knowingly benefit from participation in a venture engaged in forced labor.<sup>9</sup> Most recently in August 2022, former workers at a Malaysian rubber glove maker filed a class action lawsuit asserting claims for trafficking and forced labor in violation of the TVPPRA in the District Court for the District of Columbia. In their complaint, the plaintiffs allege that Brightway, a disposable glove manufacturer located in Malaysia, is a major supplier of gloves to the defendants Ansell Corporation, Ansell Health Products LLC, and Kimberly-Clark Corporation.<sup>10</sup> The complaint alleges that the defendants explicitly recognized the existence and perpetuation of forced labor in Malaysian glove manufacturing firms, including their own supply chains and, therefore, have knowingly profited from the forced labor of individuals manufacturing and producing disposable gloves at Brightway.<sup>11</sup> The defendants have yet to file an answer in this case, and litigation remains ongoing.

In other TVPPRA cases, the Ninth Circuit recently affirmed a motion for summary judgment for seafood processing factory owners after Cambodian citizens were allegedly trafficked into Thailand and forced to work at the factory.<sup>12</sup> The court reiterated that the TVPPRA applies to extraterritorial jurisdictions only if the alleged offender is a U.S. citizen or lawful permanent resident, or if the alleged offender (which may be a corporation) is otherwise present in the United States. In that case, the companies engaged in the alleged labor trafficking were not present in the United States at the time of the violations, so the court found the TVPPRA could not apply.<sup>13</sup> In contrast, the D.C. Circuit recently affirmed the denial of a motion to dismiss against Pan American Health Organization (“PAHO”), an organization affiliated with the World Health Organization, in a class action brought by Cuban physicians alleging that PAHO provided or knowingly benefited from Cuban physician forced labor in Brazil.<sup>14</sup> The court found that the PAHO is not immune to TVPPRA claims, although the substance of the claim is yet to be determined.<sup>15</sup>

In recent district court cases, plaintiffs have struggled to bring successful claims under the TVPPRA. For example, in *Doe I v. Apple Inc.*, a group of plaintiffs brought a claim alleging that Apple purchased cobalt from companies in the Democratic Republic of the Congo that utilized child labor for mining in violation of the TVPPRA.<sup>16</sup> In that case, the District Court of D.C. granted Apple’s motion to dismiss, finding the plaintiffs did not have standing, the alleged harm was not traceable to Apple,

and the plaintiffs failed to adequately plead a TVPRA violation.<sup>17</sup> Additionally, this year in *Coubaly v. Cargill, Inc.*, individuals from Mali sued Cargill, a company headquartered in Minnesota that processes and distributes cocoa, for human trafficking and forced labor violations under the TVPRA in the cocoa cultivation industry in Ivory Coast.<sup>18</sup> The facts of the case were largely similar to the Nestle case decided by the Supreme Court in 2021, as discussed at the start of this section.<sup>19</sup> The District Court of D.C. granted Cargill's motion to dismiss, finding that the plaintiffs failed to establish adequate standing because they did not show a traceable connection between the injuries and the defendant's conduct.<sup>20</sup> Based on these cases, it appears that plaintiffs continue to wage an uphill battle when alleging TVPRA violations in civil labor-trafficking litigation.

### **Criminal Enforcement**

There have been a number of developments in criminal labor-trafficking litigation, including an increased focus on criminal human trafficking charges against defendants in both state and federal prosecutions. The Second Circuit, for example, recently heard a case wherein the defendant, a “leading figure in a Chinese construction company,” allegedly brought Chinese workers to the United States to work in two facilities approved by the U.S. State Department.<sup>21</sup> When the workers arrived, however, the defendant transported them to nine unapproved sites, underpaid them, prohibited communications with their friends and families, and retained their immigration documentation.<sup>22</sup> The defendant was convicted for forced-labor conspiracy, forced labor, concealing passports and immigration documents, smuggling conspiracy, and visa fraud conspiracy.<sup>23</sup> On appeal, the Second Circuit remanded the forced labor convictions for a new trial due to evidentiary errors but affirmed the convictions for smuggling and visa fraud.<sup>24</sup>

In a similar case in California, a defendant trafficked individuals from Mexico to Fresno, California, under the guise of farm work opportunities.<sup>25</sup> However, once the individuals arrived, the defendant withheld their salaries and passports, forced them to work in return for housing, and threatened them with immigration consequences.<sup>26</sup> The defendant was convicted for human trafficking and extortion by means of force or threat, and the California Court of Appeals affirmed the conviction in 2021.

Although it is not a trend to include corporate entities in criminal labor-trafficking charges, there is now a case where a corporate entity has been charged under the theories of corporate liability.<sup>27</sup> In *Commonwealth v. Martins Maintenance*, for example, two women were allegedly trafficked into work at a janitorial company by a staff member who arranged their housing, withheld their passports and salaries, and threatened them with immigration consequences if they did not comply.<sup>28</sup> The lower court dismissed the indictments, finding that there was insufficient evidence to establish probable cause under corporate liability theories, but the Massachusetts Appeals Court reversed the dismissal in 2022.<sup>29</sup>

Federal prosecutors have also successfully brought Racketeer Influenced and Corrupt Organizations Act (“RICO”) charges in connection with forced labor activities. For example, in *United States v. Churuk*, a group of men allegedly operated an international human trafficking ring that recruited young Ukrainians into forced labor in Philadelphia under the guise of a better life in the United States.<sup>30</sup> The defendants were found guilty of RICO conspiracy at the district court level in Pennsylvania, sentenced to 240 months' imprisonment, and ordered to pay nearly \$300,000 in restitution.<sup>31</sup> The Third Circuit affirmed their convictions in 2020.<sup>32</sup>

Though these corporate liability and RICO cases are still developing, they may provide important insight to theories of criminal liability for labor-trafficking activities in the United States.

### **EFFECTS OF THE COVID-19 PANDEMIC AND LABOR TRAFFICKING IN HEALTH CARE SUPPLY CHAIN**

In the past few years, the COVID-19 pandemic has both highlighted and exacerbated labor-trafficking issues worldwide, particularly in industries related to pandemic response. For instance, the global demand for hand sanitizer has put heavy stress on the sugarcane industry throughout the pandemic, because hand sanitizer can be made from ethanol, which is produced from sugarcane. In 2020, risk assessment company Verisk Maplecroft found that the sugarcane industries in Brazil, India, Mexico, and Thailand—already at risk for child labor and human trafficking before the COVID-19 pandemic—were likely to face increased trafficking issues.<sup>33</sup> Likewise, increased global demand for disposable latex and synthetic gloves has magnified the already dire work situation in Malaysian

factories, particularly for migrant workers,<sup>34</sup> and there have been reports related to exploitation of workers involved in face-mask production around the world.<sup>35</sup> In response to reports about these ongoing issues, countries that have substantially increased consumption of health care supplies—like the United States and the United Kingdom—have taken steps to combat international labor abuses.

### **United States**

Low costs, economies of scale, and efficiency have historically driven the market for many critical medical supplies used in the United States, which has resulted in dependence on foreign production and raw materials.<sup>36</sup> Demand for health care supplies resulting from the COVID-19 pandemic both underscored the vulnerabilities of this arrangement—evidenced by shortages of PPE, laboratory supplies, medical devices, and other supplies—and increased labor trafficking and modern slavery in the international supply chain that the U.S. health care market relies on. Federal officials, including a U.S. Department of Health and Human Services official, have noted issues throughout supply chains for face masks, disposable latex and synthetic gloves, and sugarcane, and have recognized the increased risk of exploitative labor practices resulting from increased demand for these products.<sup>37</sup>

In combatting international labor trafficking, the United States has relied on seizure of imported goods produced using forced labor by U.S. Customs and Border Protection (“CBP”) as one method of addressing foreign labor abuses. CBP’s authority to seize goods derives from § 307 of the Tariff Act of 1930, 19 U.S.C. § 1307,<sup>38</sup> which bars importation of goods produced with forced labor. CBP can prevent importation of goods made with forced labor either by issuing a withhold release order or a formal finding against an importer.<sup>39</sup> In 2019, a withhold release order was issued targeting WRP, a Malaysian manufacturer of rubber gloves, that had been the subject of public reports of possible forced labor.<sup>40</sup> The withhold release order was revoked on March 23, 2020.<sup>41</sup> As part of that deal, WRP announced that it would repay up to \$5 million in recruitment fees, ranging from \$1,100 to \$3,800 per worker, over the next 30 months.<sup>42</sup>

In 2020, CBP issued a ban on the importation of disposable gloves from Malaysia’s Top Glove, maker of one-quarter of the

world’s rubber gloves, after finding “reasonable evidence” of labor trafficking, including poor living and working conditions and debt bondage.<sup>43</sup> CBP’s authority to prevent importation of goods has prompted many companies, including Top Glove, to reassess their workers’ housing, launch repayment plans, and renew pledges to eliminate recruitment fees.<sup>44</sup>

The Chinese treatment of Uyghur Muslim minorities, already having gained attention in the United States and other countries, has further drawn international focus due to accusations that China has been using forced Uyghur labor to produce face masks.<sup>45</sup> Following the COVID-19 pandemic, the U.S. Uyghur Forced Labor Prevention Act was introduced in Congress and later passed and signed into law. This legislation establishes a rebuttable presumption that items produced wholly or in part in the Xinjiang region of China or by certain entities with connections to Xinjiang are prohibited from entering the United States under the Tariff Act of 1930’s ban on the importation of goods produced with forced labor.<sup>46</sup> This rebuttable presumption took effect June 21, 2022.<sup>47</sup>

### **United Kingdom**

In 2022, the United Kingdom enacted the Health and Care Act 2022, which included an amendment to the National Health Service Act 2006 that requires the Secretary of State for Health and Social Care to promulgate regulations to “eradicate[e] the use in the health service in England of goods or services that are tainted by slavery and human trafficking.”<sup>48</sup> The amendment was the result of cross-party pressure resulting from the purchase of personal protective equipment from Chinese companies suspected of using forced labor, including of the Uyghur minority in Xinjiang.<sup>49</sup> This new amendment (and the regulations that will follow) will help ensure that the National Health Service is not buying or using goods or services produced by or involving any kind of slave labor.<sup>50</sup>

Additionally, in late 2020, the United Kingdom published a Personal Protective Equipment Strategy, which notes that the “improved PPE supply chain can support and align with [the United Kingdom’s] goals for United Kingdom industry, leveling up jobs and skills across the country, and doing so in a way that is ethically responsible, supporting [its] ambition to eradicate modern slavery.”<sup>51</sup> The government noted that, where “relevant and proportionate,” contracts will include clauses “to prevent instances of modern slavery.”<sup>52</sup>

The COVID-19 pandemic has demonstrated how global crises can worsen labor trafficking and modern slavery in supply chains tied to the response to the crisis. However, actions taken by the United States and United Kingdom demonstrate that countries can protect basic human rights while still responding to a global emergency.

## INTERNATIONAL EFFORTS TO COMBAT LABOR TRAFFICKING

Across the globe, other countries are also working to abolish labor trafficking. In North America, Canada is considering legislation that would require corporate and governmental actors to help eliminate the use of forced labor or child labor. In Europe, as discussed above, the United Kingdom is continuing its strong record of working to end labor trafficking with updates to laws and national supply-chain strategies in response to the COVID-19 pandemic. In other parts of Europe, the European Union and its Member States have recently taken steps forward both collectively and individually. And in Africa, Sudan and Uganda have taken steps to fight labor trafficking through the introduction of national plans and regulations.

After Canadian Prime Minister Justin Trudeau made eradicating forced labor and human rights abuses abroad a legislative priority for Canada's incoming Minister of Labor in 2021, the Canadian House of Commons unanimously voted in 2022 to support a bill that would require companies and the government to ensure their products and product components are not produced using forced labor or through exploitation of child workers.<sup>53</sup> The bill, for which the Minister of Labor ensured government support, is currently in committee in the House of Commons and tabled in the Senate.<sup>54</sup>

In early 2022, the European Commission adopted a proposal for a directive on corporate sustainability due diligence.<sup>55</sup> The proposal—a goal of which is to “foster sustainable and responsible corporate behavior in supply chains”—if implemented as drafted, would require companies to prevent, reduce, or eliminate any adverse impacts of their activities on human rights, including in the areas of child labor and the exploitation of workers.<sup>56</sup> The proposal, initially applicable to approximately 12,000 companies, would after two years expand to apply to additional businesses in high-impact sectors (e.g., textiles and

mining).<sup>57</sup> National governments would set financial penalties for violations, and victims could sue for compensation even if the harm occurred outside the European Union.<sup>58</sup> The proposal is currently pending a final vote by the European Parliament and the Council of the European Union.<sup>59</sup>

Starting in 2022, new reporting and due diligence obligations took effect in Switzerland<sup>60</sup> and Norway;<sup>61</sup> these obligations carry potential fines for noncompliance.<sup>62</sup> The Dutch government is also preparing to take action: In March 2021, a cross-party bill on responsible international business conduct was submitted to the Dutch Parliament. The bill would impose duty of care on all companies in the Netherlands and due diligence obligations on Dutch companies with more than 250 employees.<sup>63</sup> The bill, which would replace the 2019 Child Labour Due Diligence Law, would provide for financial sanctions and criminal penalties and allow harmed third parties to sue in civil court.<sup>64</sup> In June 2022, it was announced that this bill will be aligned with aforementioned European Union's proposal for a directive on corporate sustainability due diligence.<sup>65</sup> Further, in December 2021, after the European Commission delayed to 2022 the announcement of a proposal for a sustainable corporate governance directive at the European level, the Dutch Foreign Trade and Development minister expressed disappointment in the Commission and announced that the Netherlands would develop and introduce its own national legislation on human rights due diligence.<sup>66</sup> The Netherlands Ministry of Foreign Affairs has noted that the COVID-19 crisis had a direct impact on employees, with many having to “work in unsafe conditions or face the threat of redundancy.”<sup>67</sup>

Similarly, Germany recently passed the Supply Chain Due Diligence Act, which will take effect on January 1, 2023, and will, among other things, require certain major companies to create procedures to monitor for and stop abuses throughout their supply chains and create an abuse-reporting system for victims and third parties.<sup>68</sup> Companies in violation of the Act may be subject to fines (in exceptional cases, up to 2% of average annual turnover) and temporary exclusion from public procurement.<sup>69</sup> Victims whose “legal interest[s] of paramount importance,” such as life and limb, have been violated may sue through nongovernmental agencies or trade unions;<sup>70</sup> The relevance of this extension of standing provisions is not absolutely clear; indeed, as the Act expressly states, violations

against it do not lead to civil liability. Against this background, it seems most likely that victims and NGOs would primarily seek legal protection in the German administrative courts to oblige the competent authority to take action against covered companies. Victims can also report companies' violations to the Federal Office of Economics and Export Control, which can result in fines and exclusion from public procurement.<sup>71</sup>

The African nations of Sudan and Uganda have also taken action against labor trafficking in the past few years. These countries have seen increased labor exploitation since the start of the COVID-19 pandemic. In Eastern Sudan, 26% of migrant workers noted an increase in forced labor or other exploitation since the beginning of the pandemic, with seasonal migrant workers most acutely noticing the increase, particularly in the area of working extra hours without compensation.<sup>72</sup>

On March 17, 2022, the International Labour Organization's Protocol on Forced Labour took effect in Sudan.<sup>73</sup> The protocol, a binding treaty, requires governments to take measures to tackle forced labor in all its forms.<sup>74</sup> Countries that ratify the protocol must, for example, ensure that all workers in all sectors are protected by legislation.<sup>75</sup> On August 30, 2021, Sudan launched the 2021–2023 National Action Plan for Combatting Human Trafficking to provide survivors with social, educational, and employment supports; enhance law enforcement training on trafficking; and bring Sudanese law in line with international frameworks governing human rights.<sup>76</sup> The plan also establishes specialized prosecutor offices and courts for trafficking.<sup>77</sup>

In Uganda, the Employment (Recruitment of Ugandan Migrant Workers) Regulations of 2021 went into effect on August 13, 2021.<sup>78</sup> The goal of the regulations is to protect Ugandans working as migrant workers by “prescribing the appropriate terms and conditions of their employment and providing mechanisms for regulating activities of companies and their agents.”<sup>79</sup> The regulations include, *inter alia*, requirements for verification of job orders and accreditation of all foreign recruitment agencies by Uganda's diplomatic missions abroad and prohibitions on non-Ugandans owning external recruitment agencies and deceptive recruitment.<sup>80</sup> Penalties for illegal recruitment activities include fines and/or imprisonment and are a significant increase from 2005 recruitment

regulation penalties.<sup>81</sup> Unfortunately, according to the Global Fund to End Modern Slavery (GFEMS) Final Report—published on March 8, 2022—enforcement of this law has been somewhat lacking at present.<sup>82</sup>

In the past couple of years, nations throughout the world have taken concrete steps to eradicate and ameliorate the effects of exploitative labor. Some countries, particularly in Europe and North America, are focusing their efforts on effecting change downstream by requiring companies to meet reporting and/or supply chain due diligence obligations. Efforts in Sudan and Uganda, in contrast, target those who actually recruit and/or provide labor. While these differing strategies likely reflect the disparate economies of countries, all reflect increased global interest and effort in developing greater protections for workers and eliminating exploitative business practices across the globe.

## CONCLUSION

The COVID-19 pandemic has demonstrated how global crises can worsen labor trafficking and modern slavery in supply chains tied to the response to the crisis. Recent litigation and legislation across the globe demonstrate the need for companies to consider conducting due diligence to identify forced labor that may be present in their supply chains. Health care companies may wish to incorporate the trafficking core competencies for health systems developed by the National Human Trafficking Training and Technical Assistance Center as a method to develop prevention strategies of labor trafficking.<sup>83</sup> Companies should continue to ensure they are in compliance with current regulations and remain apprised of ongoing developments. As the laws on labor trafficking in supply chains continually evolve, companies should regularly evaluate their compliance programs. Companies should consult with counsel and labor experts to ensure that their current practices and policies are in compliance with relevant U.S. and international law.

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## ENDNOTES

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