Mitigating Supply Chain Risks Related To Uighur Forced Labor

By **Betsy Popken**


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U.S. lawmakers cannot agree on much these days, but one thing they can agree upon is that forced Uighur labor has no place in the supply chains of American companies.

While Beijing has long suppressed the cultural and religious practices of ethnic Uighurs,[1] in 2017 the Chinese government began detaining Uighurs in reeducation camps in China's Xinjiang Uighur Autonomous Region, forcing them to work in factories and on farms.[2] Recent reports indicate that the Chinese government may even be engaged in the forced sterilization and birth control of the Uighur population.[3]

Human rights groups have sounded the alarm that forced Uighur labor is making its way into the products we buy, and the U.S. government has responded with a growing set of laws, regulations and recommendations that affect businesses ranging from tech to fashion.[4] This article lifts the veil on these new government responses and provides guidance to companies navigating them.

New U.S. Laws, Regulations and Recommendations

To understand how these recent developments affect your company, it is important to have the full picture of recent laws, regulations and recommendations. In October 2019, the U.S. government issued visa restrictions on Chinese officials connected to human rights abuses there.[5] That month, the administration also added 28 Chinese firms and government agencies to the U.S. Department of Commerce's Entity List, which imposes additional license requirements on exports from these entities to the U.S.[6]

Nine more entities were added in June of this year.[7] Also in June, Congress passed the bipartisan Uyghur Human Rights Policy Act. Among other things, the act mandates economic and visa sanctions on individuals and entities deemed responsible for human rights abuses in Xinjiang.[8]

The following month, the U.S. Department of the Treasury sanctioned four Chinese Communist Party officials under the Global Magnitsky Human Rights Accountability Act which, among other things, prohibits U.S. firms and individuals from engaging in any financial transactions with these officials.[9]

Uyghur Forced Labor Prevention Act

While these developments restrict U.S. companies from doing business with the named individuals and entities, others have the potential to impact companies' operations even further. In particular, the Uyghur Forced Labor Prevention Act, which passed the U.S. House of Representatives in September and is now before the Senate, would establish a rebuttable presumption that all labor occurring in Xinjiang, or associated with Xinjiang's "poverty alleviation" or "mutual pairing assistance" programs, constitutes forced labor, and therefore such goods would be banned from exportation to the U.S.[10]

According to the act, the rebuttable presumption can only be overcome if U.S. Customs and Border Protection finds by clear and convincing evidence that the goods were not produced wholly or in part with forced labor and submits that finding to Congress for approval. The bill would also impose economic and visa sanctions on foreign persons who knowingly engage in, are responsible for, or facilitate either the forced labor or the exportation of goods made by forced labor in Xinjiang.

Moreover, the U.S. Department of State would have 90 days to determine whether the forced labor in Xinjiang is "systematic and widespread and therefore constitutes an atrocity within the meaning of section 6 of the Ellie Wiesel Genocide and Atrocities Prevention Act of 2018." Such a determination by the State Department could also carry more serious legal risks for companies.

If the Uyghur Forced Labor Prevention Act passes, it will have far-reaching consequences for companies sourcing products from Xinjiang and potentially other parts of China.

Withhold Release Orders

More immediately of consequence to companies sourcing from Xinjiang are the new withhold release orders, including on apparel and computer parts, issued by CBP in September of this year.[11]

The new withhold release orders direct CBP officers at all ports of entry to withhold release on: (1) all products made with labor from Lop County No. 4 Vocational Skills Education and Training Center in Xinjiang; (2) hair products made in the Lop County Hair Product Industrial Park in Xinjiang; (3) apparel produced by Yili Zhuowan Garment Manufacturing Co. Ltd. and Baoding LYSZD Trade and Business Co. Ltd in Xinjiang; (4) cotton produced and processed by Xinjiang Junggar Cotton and Linen Co. Ltd. in Xinjiang; and (5) computer parts made by Hefei Bitland Information Technology Co. Ltd. in Anhui, China.

As a result, companies should ensure that these suppliers and manufacturers are not in their supply chain.

Xinjiang Supply Chain Business Advisory

These withhold release orders come on the heels of the Xinjiang Supply Chain Business Advisory, issued in July by an interagency working group — the Department of State, Department of the Treasury, Department of Commerce and U.S. Department of Homeland Security — warning companies about the legal, reputational and economic risks of exposing their supply chains to forced Uighur labor in Xinjiang, and recommending that companies conduct human rights due diligence to mitigate those risks.[12]

The advisory flags the following heightened risks for companies: (1) assisting in developing surveillance tools for the Chinese government; (2) relying on labor or goods sourced in Xinjiang; and (3) aiding in the construction of internment facilities used to detain Uighurs. Although the advisory is nonbinding, it spells out interagency expectations about what companies should do to avoid forced Uighur labor in their supply chains.

The advisory makes clear that the Chinese government is violating international human rights law, and therefore encourages companies to conduct human rights due diligence in line with the United Nations Guiding Principles on Business and Human Rights,[13] the Organization for Economic Cooperation and Development Guidelines on Multinational Enterprises[14] and the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[15]

The advisory notes:

> While due diligence practices will vary based on the size and nature of the business, well-documented and implemented due diligence policies and procedures may potentially be considered as mitigating factors by U.S. authorities, in the event businesses inadvertently engage in sanctionable activity or activity that violates domestic law.

However, the advisory also acknowledges the challenges of conducting human rights due diligence in China due to the government's recent detention, harassment and threats to third-party auditors. Since this advisory was released in July, an increasing number of third-party auditors now refuse to conduct supply chain audits in Xinjiang.[16]

Companies would be wise to heed the advisory's guidance to ensure that they are abiding by the laws and regulations described above, as well as the Trafficking Victims Protection Reauthorization Act.[17] The TVPRA criminalizes the act of benefitting financially, or by receiving anything of value, from forced labor where the defendant knew or recklessly disregarded such forced labor and knowingly participated in the relevant venture.

Guidance for Companies Sourcing from China

Companies sourcing from China, and Xinjiang in particular, should take the following steps to mitigate their legal, reputational, and financial risks and ensure they are not causing, contributing to or directly linked to the Chinese government's human rights abuses against the Uighur people:

1. Review your supplier contracts.

Companies should review their supplier contracts to ensure that they are not doing business with the individuals and entities identified in the set of laws, regulations and recommendations discussed above.

2. Trace your supply chain.

Companies should also trace their upstream supply chain to ensure that such identified individuals and entities — or any suppliers from Xinjiang or connected to the human rights abuses there — are not present anywhere in the company's supply chain.

3. Ensure your human rights policy covers the situation in Xinjiang.

Companies should revisit their human rights policy to ensure that it covers the situation in Xinjiang. According to the United Nations Guiding Principles on Business and Human Rights, this policy should be approved by senior leadership, publicly available and communicated, and reflected in operational policies and procedures.[18]

4. Conduct human rights due diligence.

Companies should conduct ongoing human rights due diligence of their supply chain, as recommended in the Xinjiang Supply Chain Business Advisory. Human rights due diligence should "include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[19]

Reviewing supplier contracts and tracing the company's supply chain are two elements of a broader due diligence process. While human rights impact assessments often include on-the-ground interviews and observations, due diligence associated with human rights abuses in Xinjiang will need to take into consideration the very real risk to third-party auditors in China.

5. Ensure your existing grievance mechanisms capture human rights abuses in the company's supply chain.

As part of the human rights due diligence process, companies "should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."[20] In this particular example, companies should ensure that their existing grievance mechanisms capture any potential complaints by or about individuals adversely affected in the company's supply chain.

6. Remediate any contribution to human rights abuses in Xinjiang.

If a company's human rights due diligence uncovers that the company has caused or contributed to adverse impacts in Xinjiang, the company should remediate.[21] While international human rights law does not necessarily dictate that companies must terminate a business relationship that is legal under domestic law, particularly where leverage can be exercised, companies with upstream supply chains in China should consider whether there are alternative suppliers and locations from which to source their products.

7. Stay apprised of the situation in Xinjiang.

Companies should stay apprised of the human rights situation in Xinjiang through regular communications with nongovernmental organizations reporting on conditions there, engaging in multi-stakeholder initiatives and reading publicly available reporting of unfolding events.

8. Stay apprised of regulatory and legal developments.

Companies should stay apprised of the growing set of regulations and laws that address the human rights abuses in Xinjiang, including by tracking the Uyghur Forced Labor Prevention Act in the Senate.

Unfortunately, the human rights abuses against the Uighur people in Xinjiang are unlikely to stop any time soon. Likewise, U.S. government action on the issue is unlikely to diminish given bipartisan support for condemning the human rights abuses in Xinjiang and confronting China economically. Therefore, companies would be well advised to stay apprised of the situation and take the steps recommended above in order to diminish risks to the company and avoid contributing to the human rights abuses against the Uighur people.

Betsy Popken is special counsel, and co-leader of the global business and human rights practice, at Orrick Herrington & Sutcliffe LLP.

article is for general information purposes and is not intended to be and should not be taken as legal advice.

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[20] UNGP 29.

[21] UNGP 22.