

**MANDATED CORPORATE RESPONSIBILITY FOR HUMAN  
TRAFFICKING: NEW FEDERAL ACQUISITION REGULATION  
STEPS UP SUPPLY CHAIN ACCOUNTABILITY**

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On March 2, 2015, the federal government issued a mandate that all companies with a government contract comply immediately with human trafficking rules incorporated into the Federal Acquisition Regulation (FAR).<sup>1</sup> The new clause in the FAR stems from the 2012 Executive Order, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” where President Barack Obama reiterated the United States’ policy prohibiting the United States—the largest purchaser of goods and supplies in

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1. *U.S. Government Requires All Companies With a Federal Contract to Comply With Stringent New Human Trafficking Regulations*, HUSCH BLACKWELL (Mar. 17, 2015), <http://www.huschblackwell.com/businessinsights/us-government-requires-all-companies-with-a-federal-contract-to-comply-with-stringent-new-human-trafficking-regulations> [http://perma.cc/ZU2L-2EC8].

the world—from contributing to this pernicious criminal activity that “tears at our social fabric,” “distorts markets,” “endangers public health,” and “fuels violence and organized crime.”<sup>2</sup> Although human trafficking comprises both sex trafficking and labor trafficking, this article focuses on the problem of labor trafficking. Part I discusses the problem of forced labor in the supply chain, and its impact on the global economy. Part II traces federal efforts to eradicate forced labor and other forms of trafficking. Part III discusses state and international efforts to force stricter supply chain management.

### I. HUMAN TRAFFICKING IN THE SUPPLY CHAIN

Human trafficking encompasses both sex trafficking—defined as the “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”<sup>3</sup>—and labor trafficking—defined 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.”<sup>4</sup> In recent years, few of societies’ concerns have garnered more study, community involvement, and government and international reaction than the problem of human trafficking. In 2012, the International Labour Organization (ILO)<sup>5</sup> estimated that 20.9 million people—approximately three of every 1000 people worldwide—were being trafficked, with 14.2 million of those being victims of forced labor, primarily in the fields of agriculture, construction, domestic work, manufacturing, mining, and utilities.<sup>6</sup> The ILO estimated that the total

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2. President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<http://perma.cc/Z8KV-FBDC>].

3. 22 U.S.C. § 7102(9) (2012).

4. *Id.* § 7102(8)(b).

5. See *Origins and History*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm> [<http://perma.cc/LZD6-J53H>] (last visited Aug. 6, 2015). The International Labour Organization, an agency of the United Nations, was created in 1919 as part of the Treaty of Versailles that ended World War I. *Id.*

6. Int’l Labour Office, *Profits and Poverty: The Economics of Forced Labour*, INT’L LABOUR ORG. 7 (2014), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_243391.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf) [<http://perma.cc/6LZ8-SPZ8>]; see *ILO 2012 Global Estimate of Forced Labour Executive Summary*, INT’L LABOUR ORG. 1 (2012), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_181953.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf) [<http://perma.cc/6FVS-K4SS>]. While considered among the most reliable and respected of all global studies on the subject of human trafficking forced labor, the ILO acknowledged the difficulty in researching and quantifying criminal activities, which attempt to remain hidden. *Id.* at 4. Nevertheless, its 2012 study represented a well-reasoned—albeit conservative—estimate of the global problem of human trafficking. *Id.* at 6.

global illegal profits obtained from trafficking amounts to \$150.2 billion per year, with one-third of that—\$51.2 billion—derived from forced labor.<sup>7</sup>

Consumers who “buy American” often harbor under the mistaken assumption that the goods are produced in a manner free of human rights issues. But ever-expanding and increasingly complex supply chains make this assumption dubious. The world economy has made supply chains long and complicated, and trafficking at any level taints the rest of the chain. It is estimated that between nineteen and fifty-seven slaves support the lifestyle of a twenty-five-year-old female living in St. Louis, Missouri in a one-bedroom, one-bathroom rented apartment—with the difference based solely on the size of the woman’s wardrobe.<sup>8</sup> Between thirty-eight and seventy-three slaves support the lifestyle of a twenty-five-year-old man, when the same assumptions are made.<sup>9</sup>

Every aspect of American life relies on consumer items that may have been produced by victims of forced labor. The supply chain can be tainted by the incorporation of cotton grown in China and India<sup>10</sup> into clothing, sheets, and towels, or by the incorporation of minerals mined in Africa<sup>11</sup> into

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7. *Profits and Poverty*, *supra* note 6, at 13. While forced labor represents one-third of the illicit profits generated annually from traffickers in 2014, prosecutions and convictions for forced labor lagged far behind those obtained for sex trafficking. *Id.* According to the 2015 United States Department of State’s “Trafficking in Persons Report,” fewer than five percent of prosecutions and convictions for human trafficking are forced labor-related. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 48 (July 2015), <http://www.state.gov/documents/organization/245365.pdf> [<http://perma.cc/32YV-PMBN>].

8. *See Slavery Footprint Survey*, SLAVERYFOOTPRINT.ORG, <http://slaveryfootprint.org/my-footprint#> [<http://perma.cc/J56B-4C6Z>] (last visited Aug. 6, 2015). The “total slavery footprint” represents the number of forced laborers who are likely to be involved in creating and manufacturing the products individuals buy, which slaveryfootprint.org determines from information regarding the processes used to create the products, and the countries in which stages of production take place. *See Methodology*, SLAVERYFOOTPRINT.ORG, <http://slaveryfootprint.org/about/#methodology> [<http://perma.cc/HY5C-EPSY>] (last visited Oct. 12, 2015). Other assumptions in determining the total slavery footprint of the twenty-five-year-old female living in St. Louis, Missouri include that the woman owns one car; has a “medium” appetite and eats equal amounts of food from each major food group; owns no jewelry, game console, digital camera, or sporting goods; and is an average user of electronics.

9. *See Slavery Footprint Survey*, *supra* note 8.

10. *See* BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 3–4 (2014), [http://www.dol.gov/ilab/reports/pdf/TVPRA\\_Report2014.pdf](http://www.dol.gov/ilab/reports/pdf/TVPRA_Report2014.pdf) [<http://perma.cc/J8QM-R95C>]. China and India are among the countries where cotton may be the product of forced labor. *Id.* The sixth edition of the Department of Labor’s “List of Goods Produced by Child Labor or Forced Labor” identifies 136 goods and their source countries—seventy-four in all—which it believes are the products of child and forced labor. *Id.* at 3.

11. *See id.* at 4. Minerals like coltan are mined in Africa and have been identified as the product of forced labor in countries, including the Democratic Republic of Congo. *Id.*

electronics and smartphones.<sup>12</sup> Both of these reflect abuse only at the lowest tiers of the supply chain where raw materials are obtained and processed. Many of the abuses take place higher up the chain—in factories where raw materials are manufactured into component parts, where components are manufactured into finished products, or while transporting and warehousing goods.<sup>13</sup>

To illustrate the complexity of the problem, Ford Motor Company disclosed that, in 2006, it discovered its supply chain included charcoal produced in Brazil through forced labor,<sup>14</sup> where debt bondage is a common form of forced labor.<sup>15</sup> Individuals involved in the production of charcoal are recruited to remote locations where they work under abusive conditions.<sup>16</sup> They go unpaid or may not be paid sufficiently to cover the goods and services they need—a problem compounded by the fact that, due to the remoteness of worksites, families are forced to buy everything from company stores with inflated prices, resulting in further debt.<sup>17</sup> Ford Motor Company is not a purchaser of charcoal, but it is a purchaser of pig iron, which is a key ingredient in steel production.<sup>18</sup> Pig iron made from illegally-produced charcoal was being shipped to the United States and sold to Ford, where Ford

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12. Office to Monitor and Combat Trafficking in Persons, *A Day in Your Life: Touched by Modern Slavery*, U.S. DEP'T OF ST. (June 2014), <http://www.state.gov/documents/organization/233950.pdf> [<http://perma.cc/K66Y-LTYZ>].

13. See Verité, *Strengthening Protections Against Trafficking in Persons in Federal and Corporate Supply Chains*, U.S. DEP'T OF ST. 142–45 (Jan. 2015), <http://www.state.gov/documents/organization/237137.pdf> [<http://perma.cc/MWB2-ACDC>]. Transportation and warehousing include land, air, and sea passenger and freight cargo services, and warehousing of goods. The United States has documented human trafficking abuses in this sector in numerous countries, and there are a number of risk factors for trafficking inherent in the industry, including that the work is hazardous and undesirable, relies on a migrant and unskilled labor force, and utilizes middlemen. *Id.*

14. FORD MOTOR CO., SUSTAINABILITY REPORT 2013/14: FORCED LABOR AND HUMAN TRAFFICKING IN SUPPLY CHAINS (2014), <http://corporate.ford.com/microsites/sustainability-report-2013-14/supply-materials-trafficking.html> [<http://perma.cc/N7RG-87U5>].

15. TRAFFICKING IN PERSONS REPORT 2015, *supra* note 7, at 98. Debt bondage is “the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” 22 U.S.C. § 7102(4) (2012).

16. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 95 (2012), <http://www.state.gov/documents/organization/192594.pdf> [<http://perma.cc/4E2X-8GJH>].

17. *Charcoal*, VERITÉ, <http://www.verite.org/Commodities/Charcoal> [<http://perma.cc/3VHL-9CUH>] (last visited Oct. 28, 2015).

18. *Id.*

used it to manufacture steel.<sup>19</sup> And this accounts for only one component of its finished automobiles.

Forced labor is an enormous concern in the production of electronics, where jobs are primarily low-wage and low-skilled, and industry competition is driven by low labor cost.<sup>20</sup> Forced labor can exist at multiple levels of the electronics supply chain—from raw material excavation and mining, to smelting and manufacturing, to transportation.<sup>21</sup>

In 2012, Verité, a non-profit corporation whose mission is to ensure safe working conditions globally, reported the results of a two-year investigation into electronics manufacturing in Malaysia, where manufactured electronics account for approximately thirty-two percent of the country's exports.<sup>22</sup> While estimates of foreign labor as a percentage of the workforce in Malaysia have been difficult to quantify,<sup>23</sup> Verité's study revealed that before foreign nationals even reach Malaysia, they often have paid fees to two different third-party recruiters in their home countries.<sup>24</sup> Subagents in small towns and rural areas charge workers a fee for a referral in a larger city located in the sending country.<sup>25</sup> The larger agency also charges fees and performs services that include the preparation of legal documents and arrangements for travel to Malaysia.<sup>26</sup> The fees charged by subagents and recruiters in the workers' home countries are often unregulated or above the legally allowable rate, leaving workers saddled with debt before they even perform a day's work.<sup>27</sup>

Once in Malaysia, workers often are handed over to yet a third Malaysia-based labor supplier, and, due to recent change in Malaysian law, those agents

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19. See FORD MOTOR CO., *supra* note 14. Following the discovery of charcoal tainted by forced labor in its supply chain, Ford reported that it immediately stopped sourcing from that site in Brazil, and took steps to identify and root out all potential points of entry of pig iron in its supply chain. *Id.*

20. VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA: A COMPREHENSIVE STUDY OF SCOPE AND CHARACTERISTICS 22 (2014), <http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014.pdf> [<http://perma.cc/8BPM-B6DU>].

21. *Id.* at 25.

22. *Id.* at 22. Electronics are manufactured in Malaysia for numerous American companies, including Apple and Dell. Steven Greenhouse, *Report Cites Forced Labor in Malaysia*, N.Y. TIMES, Sept. 17, 2014, at B1, B9 (stating that Apple uses thirty factories in Malaysia); see also DELL, AN ANNUAL UPDATE ON OUR 2020 LEGACY OF GOOD PLAN 25 (2015), <http://i.dell.com/sites/doccontent/corporate/corp-comm/en/Documents/fy15-cr-report.pdf#page=31> [<http://perma.cc/T5KK-GBKZ>].

23. VERITÉ, *supra* note 20, at 27–28 (citing sources indicating that foreign labor accounts for twenty to sixty percent of the workforce in the electronics sector).

24. *Id.* at 29. Apple has reported that its supply chain includes 18,000 workers in Malaysia, 4,000 of whom are migrant contract workers. See Greenhouse, *supra* note 22, at B9.

25. VERITÉ, *supra* note 20, at 29.

26. *Id.*

27. *Id.* at 29–30.

may permissibly become the workers' employers.<sup>28</sup> According to the Verité report, foreign workers in Malaysia become dependent on the "agent-as-employer" for housing, food, transportation, and their legal statuses in Malaysia because only the employer is authorized to apply for, renew, or cancel an individual's work permit.<sup>29</sup> This arrangement exposes workers to exploitation and abuse because liability for violations of workers' rights is obscured.<sup>30</sup> Workers reported being moved from one facility to another with no control over the assignments, being furloughed—between job assignments or as punishment—with no indication of how long a furlough would last, and having to borrow money from their employers in the interim, thus compounding their debt problem.<sup>31</sup> Further, workers often have no ability to return to their home countries because the agent-as-employer maintains possession of their passports.<sup>32</sup> Indeed, nearly all of the foreign workers participating in the study reported that their agent-as-employer had current possession of their passports (generally confiscated at the airport upon arrival into Malaysia), and that they had little to no ability to get it if necessary.<sup>33</sup> For those who were able to obtain temporary possession of their passports, many were required to put down "deposits" equal to at least a month's wages, sometimes up to several months' wages.<sup>34</sup> In this way, it becomes impossible for an employee to leave an employer both because of the massive debt accrued, and because it is literally impossible to leave without appropriate legal documents.<sup>35</sup>

But human trafficking and modern-day slavery is not just an international problem relegated to factories and mines in third-world countries and emerging markets. The United States has its own homegrown forced labor problems—it is considered a source, transit, and destination country for all types of human trafficking.<sup>36</sup> The National Human Trafficking Resource Center Hotline (NHTRC), which is funded by the United States Department of Health and Human Services, fielded 24,062 communications (whether by phone, e-mail, or online tip reports) related to domestic human trafficking in 2014, and approximately nineteen percent of incidents involved labor trafficking

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28. *Id.* at 29.

29. *Id.* at 31.

30. VERITÉ, *supra* note 20, at 31.

31. *Id.* at 94.

32. *Id.* at 95–97.

33. *Id.* at 119.

34. *Id.* at 121.

35. VERITÉ, *supra* note 20, at 121. The Verité report also identifies a host of other indicators of forced labor in the Malaysian electronics manufacturing sector. *Id.* at 93–94.

36. TRAFFICKING IN PERSONS REPORT 2012, *supra* note 16, at 359.

activities.<sup>37</sup> Though most tips originated from California, Texas, Florida, and New York, the NHTRC fielded tips from all fifty states.<sup>38</sup>

The victims of forced labor in the United States vary and can be anyone, from United States citizens and lawful permanent residents to undocumented workers. Migrant laborers legally in the country on temporary H-2A and H-2B visas are particularly vulnerable to labor trafficking.<sup>39</sup> The H-2A program allows United States employers to bring foreign nationals to the United States to fill temporary agricultural jobs.<sup>40</sup> The H-2B program operates similarly but is for unskilled, temporary work outside the agricultural sector.<sup>41</sup> Under either program, a United States employer (or a United States agent as described in the regulation) petitions the United States government for the visa on behalf of the worker for a particular job, which ties a worker's immigration status directly to his or her employer.<sup>42</sup> This can lead to employer abuse, threats of deportation, and physical violence as well as disincentives to report such abuses.<sup>43</sup>

For example, in 2009, six individuals associated with a Kansas City, Missouri-based labor supplier were indicted for forced labor violations in connection with the fraudulent labor leasing of individuals to hotels, resorts, and casinos.<sup>44</sup> Once here, the foreign nationals were not paid for all hours worked, were not paid overtime, and portions of their earnings were retained.<sup>45</sup> They were charged additional fees for transportation, uniforms, visa extensions (even if no extension was obtained), and fees that were never identified or explained.<sup>46</sup> Underpayment plus exorbitant fees resulted in a paycheck with negative earnings to ensure that workers did not make enough to repay the

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37. NAT'L HUMAN TRAFFICKING RES. CTR., ANNUAL REPORT 4–5 (2014), [http://www.traffickingresourcecenter.org/sites/default/files/2014%20NHTRC%20Annual%20Report\\_Final.pdf](http://www.traffickingresourcecenter.org/sites/default/files/2014%20NHTRC%20Annual%20Report_Final.pdf) [<http://perma.cc/93BF-CYMS>].

38. *Id.* at 3–4.

39. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 36–37 (2015), <http://www.gao.gov/assets/670/668875.pdf> [<http://perma.cc/MMF5-464J>].

40. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012).

41. *Id.* § 1101(a)(15)(H)(ii)(b).

42. 20 C.F.R. §§ 655.15(e), 655.130 (2012).

43. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 38. Numerous abuses also take place at the recruitment phase. *Id.* at 31. For example, workers may be charged prohibited fees for recruitment or may be falsely led to believe that housing will be provided for free. *Id.* at 31–32. Or, individuals may enter on a valid visa only to find that there is no job waiting for them when they arrive. *Id.* at 31. Workers who then obtain work for an employer other than the one that petitioned for their entry may fear deportation and be more likely to tolerate abusive practices. *Id.*

44. Superseding Indictment at 6, *United States v. Askarkhodjaev*, No. 4:09-cr-00143 (W.D. Mo. Jan. 7, 2010), ECF No. 184.

45. *Id.* at 20–21.

46. *Id.* at 22; *see also* Plea Agreement at 3, *Askarkhodjaev*, No. 4:09-cr-00143 (W.D. Mo. Oct. 20, 2010), ECF No. 393 (explaining defendants' false representations).

initial debt or to pay for return transportation home.<sup>47</sup> Plus, bosses threatened to cancel the immigration statuses of the foreign nationals if they refused to work under the oppressive terms, which would leave the workers in the United States illegally, with no ability to find other legal employment and no way to pay for a return trip home, allowing bosses to perpetuate the abuses.<sup>48</sup>

In another recent case, a civil jury awarded five plaintiffs fourteen million dollars in damages after they proved they were lured away from India in the aftermath of Hurricane Katrina by Signal International (and its recruiters) with false promises of permanent residency in the United States.<sup>49</sup> The workers—welders and pipefitters—were brought to the United States to repair oil rigs and other facilities damaged by the hurricane.<sup>50</sup> The lawsuit alleged that the promise of employment and residency in the United States cost the plaintiffs \$10,000 to \$20,000 each; and when they arrived, they learned that their residency was—at best—temporary, as they were brought in on H-2B work visas.<sup>51</sup> It further alleged that when the workers arrived to the United States, Signal “forced them each to pay \$1,050 a month to live in isolated, guarded labor camps” and forced up to twenty-four men to “share a space the size of a double-wide trailer.”<sup>52</sup> When some workers attempted to secure their own housing, Signal officials advised them that they would still be charged the fee for living in the housing Signal provided.<sup>53</sup> Following the jury verdict, Signal settled eleven similar lawsuits with more than 200 guest workers from India, agreeing to pay them twenty million dollars.<sup>54</sup>

Abuses abound with undocumented workers as well. In December 2014, a trafficker in Minnesota was convicted of forced labor violations when she recruited and smuggled a Vietnamese national across the United States-Mexico border, falsely promising legal immigration status and a high-paying job.<sup>55</sup>

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47. Indictment at 22–23, *Askarkhodjaev*, No. 4:09-cr-00143 (W.D. Mo. May 6, 2009), ECF No. 1.

48. *Id.*; see also Plea Agreement, *Askarkhodjaev*, *supra* note 46, at 3 (explaining defendants’ threats of deportation).

49. *Federal Jury in SLPC Case Awards \$14 Million to Indian Guest Workers Victimized in Labor Trafficking Scheme by Signal International and Its Agents*, SOUTHERN POVERTY L. CTR. (Feb. 17, 2015), <http://www.splcenter.org/news/2015/02/18/federal-jury-splc-case-awards-14-million-indian-guest-workers-victimized-labor-trafficking> [<http://perma.cc/SV6M-MPFP>].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Nigel Duara, *\$20-Million Settlement Reached in Guest-Worker Lawsuits*, L.A. TIMES (July 14, 2015), <http://www.latimes.com/nation/la-na-ff-workers-lawsuit-20150714-story.html> [<http://perma.cc/2HKE-SB88>].

55. Press Release, FBI Minneapolis Div., Mankato, Minnesota Woman Sentenced in Forced Labor Case (Dec. 16, 2014), <http://www.fbi.gov/minneapolis/press-releases/2014/mankato-minnesota-woman-sentenced-in-forced-labor-case> [<http://perma.cc/T2R6-JK43>].

When the individual arrived, significant debt was imposed upon her, which she was forced to work down during long hours in her son's restaurant without the promised pay.<sup>56</sup>

Similarly, in August 2015, a Guatemalan national who was illegally present in the United States pleaded guilty to a forced labor conspiracy following an indictment alleging that he recruited and smuggled other Guatemalan nationals, many of them minors, into the United States to work on egg farms.<sup>57</sup> The indictment alleged that, as part of the conspiracy, the defendant obtained deeds to real property from the victims' families to secure the victims' smuggling debts and retained the deeds if any portion of the smuggling debt was unpaid.<sup>58</sup> The defendant and his conspirators lured the victims to the United States by falsely telling them that they would be able to attend school in the United States.<sup>59</sup> When they arrived, they were forced to stay in, and pay for, housing in trailers the defendants owned.<sup>60</sup> Paychecks for the victims' work on the egg farms were delivered to the defendant and his conspirators, not to the victims; and the defendant withheld all but a small portion of their pay.<sup>61</sup> They were forced to work six or seven days per week, twelve hours per day. Complaints about the working conditions were met with threats of physical injury or death to the victims and members of the victims' families, and resulted in the transfer to a housing unit that had "no bed, no heat, no hot water, no working toilets, and vermin."<sup>62</sup>

In May 2015, Sarah Maslin Nir, writing for the *New York Times*, exposed the unsavory underbelly of New York City nail salons, where migrant workers (often in the country illegally) interact on a daily basis with some of the most affluent members of society.<sup>63</sup> The article highlights how most people get their jobs—by paying a recruitment or "training" fee to salon owners of up to \$100 to \$200—and then are required to work for weeks or months for no pay at all.<sup>64</sup> After the training period, workers are "hired" and then paid approximately three dollars per hour—or nothing at all at some salons in Brooklyn and the Bronx, where workers are paid only a commission.<sup>65</sup> Many times tips or wages

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56. *Id.*

57. Superseding Indictment at 3, *United States v. Castillo-Serrano*, No. 3:15-cr-00024 (N.D. Ohio July 1, 2015), ECF No. 28; Report and Recommendation at 1, *Castillo-Serrano*, No. 3:15-cr-00024 (N.D. Ohio Aug. 24, 2015), ECF No. 56.

58. Superseding Indictment, *Castillo-Serrano*, *supra* note 57, at 6.

59. *Id.* at 7.

60. *Id.*

61. *Id.* at 7–8.

62. *Id.* at 12.

63. Sarah Maslin Nir, *The High Price of Pretty Nails*, N.Y. TIMES, May 10, 2015, at A1, A20.

64. *Id.*

65. *Id.* at A20, A21.

are skimmed, never delivered, or deducted as punishment for minor transgressions like spilled nail polish.<sup>66</sup>

And those children offering inexpensive books and magazines door to door? They might be victims of a forced labor ring where managers fraudulently lure young people from their hometowns with the promise of travel and good wages.<sup>67</sup> Workers in these rings are forced to work ten to fourteen hours a day, six days a week, sleep three to a hotel room, and are given only up to ten dollars per day in food money while their earnings are kept “on the books” for later payment.<sup>68</sup> But earnings typically disappear due to “debts” to the crew for housing and transportation.<sup>69</sup> Once isolated and removed from familiar surroundings, the worker has little choice but to stay and continue to work.<sup>70</sup> And “enforcers” reportedly physically abuse workers who fail to make daily sales quotas.<sup>71</sup>

Because of the pernicious, widespread use and effect of human trafficking, the federal and state governments are taking new and more expansive measures to address the problems here and abroad.

## II. FEDERAL EFFORTS TO ERADICATE HUMAN TRAFFICKING

Forced labor is modern-day slavery. In *United States v. Kozminski*, the United States Supreme Court interpreted the scope of two criminal statutes meant to enforce the Thirteenth Amendment.<sup>72</sup> 18 U.S.C. § 241 prohibits conspiracies that interfere with rights secured “by the Constitution or laws of the United States,” and thus incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment.<sup>73</sup> And 18 U.S.C. § 1584 makes it a crime to knowingly and willfully hold another person “to involuntary servitude.”<sup>74</sup> In *Kozminski*, the defendants forced two individuals to work on a farm seven days a week, for up to seventeen hours a day.<sup>75</sup> They

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66. *Id.* at A21.

67. POLARIS, KNOCKING AT YOUR DOOR: LABOR TRAFFICKING ON TRAVELING SALES CREWS 1 (July 2015), <http://www.polarisproject.org/sites/default/files/Knocking-on-Your-Door-Sales-Crews.pdf> [<http://perma.cc/M4ZV-F9TD>].

68. Ian Urbina, *For Youths, a Grim Tour on Magazine Crews*, N.Y. TIMES, Feb. 21, 2007, at A1.

69. POLARIS, *supra* note 67, at 1.

70. *Id.*

71. Urbina, *supra* note 68, at A18.

72. *United States v. Kozminski*, 487 U.S. 931, 939 (1988).

73. 18 U.S.C. § 241 (2012); Section 1 of the Thirteenth Amendment states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

74. 18 U.S.C. § 1584.

75. *Kozminski*, 487 U.S. at 935.

were housed in squalid living conditions, and were isolated from their families and others.<sup>76</sup> Initially, they were paid fifteen dollars per week, and eventually they were paid nothing.<sup>77</sup> The government argued that the workers were “psychological hostages” whom the defendants had “brainwash[ed]” to believe they had no alternative but to work on the farm.<sup>78</sup> The Supreme Court found that this conception of involuntary servitude was too broad—that “involuntary servitude” was limited to situations involving the use or threatened use of physical or legal coercion.<sup>79</sup>

Although it took more than a decade to do so, Congress reacted to the *Kozminski* decision when it enacted the Trafficking Victims Protection Act of 2000 (TVPA). It specifically found that the Supreme Court’s interpretation of “involuntary servitude” was too narrow to deter trafficking and to bring traffickers to justice.<sup>80</sup> The TVPA makes it unlawful to provide or obtain the labor or services of a person by means of: (1) “force, threats of force, physical restraint, or threats of physical restraint to that person or another person;” (2) “serious harm or threats of serious harm to that person or another person;” (3) “the abuse or threatened abuse of law or legal process; or” (4) “any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint means.”<sup>81</sup> For the first time, the law considered work from the laborer’s perspective when determining whether services are provided voluntarily or involuntarily.

The passage of the TVPA created the first comprehensive effort to address the complex international dimension of human trafficking in the United States.<sup>82</sup> At the time of its passage, Congress believed that at least 700,000 persons annually were being trafficked internationally.<sup>83</sup> New, more accurate estimates—but nonetheless conservative—show that the number is closer to twenty-one million people.<sup>84</sup>

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76. *Id.* at 934. They were also subjected to verbal and physical abuse. *Id.* at 935.

77. *Id.* at 935.

78. *Id.* at 936.

79. *Id.* at 948, 952.

80. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. § 7101(b)(13)–(14) (2012)).

81. 15 U.S.C. § 1589 (2012).

82. 22 U.S.C. § 7101(a).

83. *Id.* § 7101(b)(1).

84. *Profits and Poverty*, *supra* note 6, at 7; *see also* Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).

The TVPA and its numerous reauthorizations<sup>85</sup> provide a four-step framework to combat human trafficking: prevention, protection, prosecution, and partnership.<sup>86</sup>

PREVENTION:

[P]revention encapsulates cross-cutting endeavors that include: rectifying laws that omit classes of workers from labor law protection; providing robust labor enforcement, particularly in key sectors where trafficking is most typically found; implementing measures that address significant vulnerabilities such as birth registrations and identification; carefully constructing labor recruitment programs that ensure protection of workers from exploitation; strengthening partnerships between law enforcement, government, and non-governmental organizations to collaborate, coordinate, and communicate more effectively; emphasizing effective policy implementation with stronger enforcement, better reporting, and government-endorsed business standards; and tackling this global crime at its root causes by monitoring product supply chains and reducing demand for commercial sex.<sup>87</sup>

PROTECTION:

Prioritizing the rights and needs of victims provides a roadmap that goes beyond the initial rescue, restores survivors' dignity, and provides an opportunity for productive lives. . . . Victim identification measures are integral in implementing the victim-centered approach. Proactively identifying victims and training first responders are of paramount importance to a country's ability to tackle this grave human rights abuse. Under the TVPA, governments have a responsibility to enable identified trafficking victims to remain in the country, work, and obtain services without fear of detention or deportation for lack of legal status or crimes that the trafficker made them commit. In addition, governments should not subject victims to impediments to obtaining proof of citizenship or to immigration relief. Safeguards should be put in place to ensure the protection of survivors, as well as their family members who may be in harm's way.

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85. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. XII, 127 Stat. 54, 55 (2013). The statute has been reauthorized in 2003, 2005, 2008, and 2013.

86. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at Release of the Ninth Annual Trafficking in Persons Report Alongside Leaders in Congress (June 16, 2009), <http://www.state.gov/secretary/20092013clinton/rm/2009a/06/124872.htm> [<http://perma.cc/SL94-92TL>]. The partnership paradigm was added to the United States' anti-trafficking paradigm in 2009. *Id.*

87. *Prevention*, U.S. DEP'T OF ST., <http://www.state.gov/j/tip/4p/prevent/> [<http://permacc5T SG-LNW4>] (last visited Sept. 24, 2015).

Rehabilitation efforts help provide emergency assistance and services; effective placement in stable, long-term situations; and access to educational, vocational and economic opportunities for survivors of modern slavery. Reintegration efforts include voluntary repatriation for trafficking victims and assistance in their home communities.<sup>88</sup>

PROSECUTION: The TVPA created the new crimes of forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; sex trafficking by force, fraud, or coercion; or sex trafficking of children; and it made unlawful certain conduct with respect to withholding documents in furtherance of trafficking.<sup>89</sup> The act mandates restitution be paid to trafficking victims.<sup>90</sup>

PARTNERSHIPS:

Partnerships augment efforts by bringing together diverse experience, amplifying messages, and leveraging resources, thereby accomplishing more together than any one entity or sector would be able to alone. Examples of existing partnerships governments use to facilitate prevention, protection, and prosecution include:

- Task forces among law enforcement agencies that cooperate to share intelligence, work across jurisdictions, and coordinate across borders;
- Alliances between governments and business associations that seek to craft protocols and establish compliance mechanisms for slavery-free supply chains; and
- Regional partnerships among nations, such as the anti-human trafficking efforts of the Organization of American States (OAS) or the European Union (EU).

Outside the government, partnerships include coalitions of nongovernmental organizations (NGOs) coming together for purposes of advocacy, service provision, information sharing, and networks of survivors, whose experiences inform the broader trafficking movement.<sup>91</sup>

These partnerships and statutes, even when enforced, have proved ineffective at stemming the tide. Since the TVPA was enacted in 2000, the estimated volume of human trafficking has increased thirty-fold.<sup>92</sup>

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88. *Protection*, U.S. DEP'T OF ST., <http://www.state.gov/j/tip/4p/protect/> [<http://perma.cc/7VXZ-5KJY>] (last visited Sept. 24, 2015).

89. 18 U.S.C. §§ 1589–1592 (2012).

90. *Id.* § 1593.

91. *Partnerships*, U.S. DEP'T OF ST., <http://www.state.gov/j/tip/4p/partner/> [<http://perma.cc/7VXZ-5KJY>] (last visited Sept. 24, 2015).

92. 22 U.S.C. § 7101(b)(1) (2012) (Congress estimating 700,000 victims of human trafficking in 2000); *see also ILO 2012 Global Estimate of Forced Labour Executive Summary*, *supra* note 6, at 3 (estimating 20.9 million victims of human trafficking in 2012).

The United States is the largest single purchaser of goods and services in the world.<sup>93</sup> Despite the United States' longstanding policy prohibiting contributing to human trafficking through its purchasing power, it has nevertheless indirectly done so. For example, the outsourcing of wartime logistics in Iraq and Afghanistan revealed the region as a hotbed of trafficking abuses perpetrated by United States government contractors abroad.<sup>94</sup> Reports surfaced of recruiters promising workers (primarily from South Asia and Africa)<sup>95</sup> lucrative jobs in places like Dubai, but they delivered low-paying jobs on military bases in war zones.<sup>96</sup> Victims were paying exorbitant fees to recruiters to get the purportedly high-paying jobs and additional fees to smugglers to get across the border.<sup>97</sup> And when workers arrived, they were often housed in shipping containers on compounds that Indian newspapers referred to as "U.S. slave camps;"<sup>98</sup> workers earned a fraction of what was promised to them; they could not afford the cost of a return ticket home; and, in some cases, could not leave even if they could afford to because their passports and identification badges had been confiscated by their employers.<sup>99</sup>

Clauses prohibiting severe forms of human trafficking, procurement of commercial sex acts, and the use of forced labor have appeared in federal service contracts since April 2006.<sup>100</sup> The 2006 version of the anti-trafficking clause included a general prohibition applicable to federal service contractors, a requirement to establish policies and procedures to ensure employee compliance, and a requirement for contractors to notify employees of the

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93. CONG. RESEARCH SERV., THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (Feb. 3, 2015), <http://www.fas.org/sgp/crs/misc/R42826.pdf> [<http://perma.cc/D4VE-BSHY>].

94. Sarah Stillman, *The Invisible Army*, NEW YORKER (June 6, 2011), <http://www.newyorker.com/magazine/2011/06/06/the-invisible-army> [<http://perma.cc/3UQM-T4J4>].

95. *Id.*; AMERICAN CIVIL LIBERTIES UNION, VICTIMS OF COMPLACENCY: THE ONGOING TRAFFICKING AND ABUSE OF THIRD COUNTRY NATIONALS BY U.S. GOVERNMENT CONTRACTORS 22 (June 2012), [http://www.aclu.org/files/assets/hrp\\_traffickingreport\\_web\\_0.pdf](http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf) [<http://perma.cc/L2V5BLBJ>]. These individuals—neither United States citizens nor nationals of the country in which work is performed—are referred to as "Third Country Nationals" (TCNs). *Id.* at 5. Government contractors in Iraq and Afghanistan relied on up to 70,000 "Third Country Nationals" at a time to support operations. *Id.* at 6. In 2010, TCNs represented more than half of contractor personnel in Iraq. *Id.* at 19.

96. *Id.* at 22.

97. *Id.* at 6.

98. *Id.* at 29 (citing David Rohde, *The Struggle for Iraq: Foreign Labor; Indians Who Worked in Iraq Complain of Exploitation*, N.Y. TIMES (May 7, 2004), <http://www.nytimes.com/2004/05/07/world/struggle-for-iraq-foreign-labor-indians-who-worked-iraq-complain-exploitation.html?pagewanted=all&src=pm> [<http://perma.cc/P7Z4-LLPQ>]).

99. AMERICAN CIVIL LIBERTIES UNION, *supra* note 95, at 24, 27.

100. Combating Trafficking in Persons, 71 Fed. Reg. 20,301 (Apr. 19, 2006) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

policy and to establish an appropriate employee awareness program.<sup>101</sup> It also required contractors to notify the government of an alleged violation and specified penalties for human trafficking violations.<sup>102</sup> The original interim version of FAR 52.222-50 also included a mandatory flow-down in all subcontracts for the acquisition of services.<sup>103</sup>

In 2007, FAR 52.222-50 was expanded to cover all federal contracts and subcontracts (not just service contracts), including those for supplies and for commercial items.<sup>104</sup> It was revised again in January 2009, primarily to add language making it clear that a contracting officer could consider the adoption of an awareness program as a mitigating factor in determining the appropriate remedy for a trafficking violation.<sup>105</sup>

The 2015 amendments to FAR Subpart 22.17 and FAR 52.222-50 go well beyond the original requirements. They introduce a list of specific types of conduct that had not previously appeared in the clause.<sup>106</sup> They add a requirement for many contractors to implement trafficking compliance plans and to certify the absence of any trafficking activities every year.<sup>107</sup> They also modify the mandatory disclosure obligations and specify the minimum level of cooperation required of contractors responding to a trafficking investigation.<sup>108</sup> Finally, the amendments to the FAR clause expand the list of contracting relationships subject to the anti-trafficking clause.<sup>109</sup>

Activities prohibited by the new FAR requirements are as follows:

- Engaging in severe forms of trafficking;
- Procuring commercial sex acts;
- Using forced labor;

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101. *Id.*

102. *Id.*

103. *Id.*

104. Combating Trafficking in Persons (Revised Interim Rule), 72 Fed. Reg. 46,335 (Aug. 17, 2007) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

105. Combating Trafficking in Persons, 74 Fed. Reg. 2741 (Jan. 15, 2009) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

106. Compare FAR 52.222-50(b) (2015), with 48 C.F.R. § 22.1703 (2014). The types of prohibited conduct were described in Executive Order 13,627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts.” Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).

107. FAR 52.222-50(h).

108. FAR 52.222-50(d), (g).

109. FAR 52.222-50(i). Because amendments to the FAR generally apply only to contracts entered into on or after the date of the amendments, *see* 48 C.F.R. § 1.108(d), the newly enacted clause regarding human trafficking will apply to contracts entered into on or after March 2, 2015. Ending Trafficking in Persons, 80 Fed. Reg. 4967 (Jan. 29, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52). Existing indefinite delivery/indefinite quantity contracts for which additional orders are anticipated will be modified “on a bilateral basis” to include the new language in FAR 52.222-50. *See id.*

- Destroying, concealing, confiscating, or otherwise denying an employee access to the employee's identity or immigration documents;
- Using misleading or fraudulent practices during recruitment;
- Using recruiters that do not comply with local labor laws;
- Charging employees recruiting fees;
- Failing to provide return transportation for employees brought to another country to work;<sup>110</sup>
- Providing or arranging housing that fails to meet the host country's housing and safety standards; and
- If required by law or contract, failing to provide an employment contract, recruitment agreement, or other required work document in writing, in a language the employee understands, and that contains specified terms of employment.<sup>111</sup>

The contractor is required to notify employees and agents of the prohibitions described above and of the actions that will be taken against employees and agents for violations.<sup>112</sup> The contractor must also take appropriate action against employees, agents, or subcontractors who violate the prohibitions in the FAR.<sup>113</sup>

In connection with a government audit or investigation of the contractor's compliance with the requirements of the FAR and other laws establishing restrictions on human trafficking and forced labor, the contractor must cooperate fully by (1) providing sufficient information "to identify the nature and extent of an offense and the individuals responsible for the conduct;" (2) providing "timely and complete responses to Government auditors' and investigators' requests for documents;" (3) providing "reasonable access to its facilities and staff;" and (4) protecting "employees suspected of being victims of or witnesses to prohibited activities" and not hindering their ability to cooperate "fully with Government authorities."<sup>114</sup>

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110. FAR 52.222-50(b). The requirement for return transportation does not apply if the employee is legally permitted to remain in the country and chooses to do so, or if an authorized official of the contracting agency exempts the employer from providing such return transportation. FAR 52.222-50(b)(7)(ii).

111. FAR 52.222-50(b)(8)–(9). Any such document must include, at a minimum, a description of the work to be performed, wages, prohibition on charging recruitment fees, work location(s), living accommodations and associated costs, time off, round-trip transportation arrangements, grievance processes, and the content of applicable laws and regulations that prohibit human trafficking. *Id.*

112. FAR 52.222-50(c)(1).

113. FAR 52.222-50(c)(2).

114. FAR 52.222-50(g). The requirement that contractors fully cooperate neither results in a waiver of the attorney-client privilege or work-product doctrine nor does it require any officer,

The contractor must also notify its Contracting Officer and the agency Inspector General of *any credible information*—from any source—indicating that its employee, subcontractor, subcontractor’s employee, or agent has engaged in conduct constituting one of the prohibited acts; and of any actions taken against the employee, subcontractor, subcontractor’s employee, or agent.<sup>115</sup>

The above prohibitions and requirements, by their terms, apply only to the contractor, and its employees and agents. In recognition of the fact that human trafficking and forced labor issues often occur at the lower subcontract tiers and frequently involve small businesses,<sup>116</sup> the contractor is required to flow the requirements of the FAR down to subcontractors. Specifically, the contractor must include the substance of FAR 52.222-50 in all subcontracts and contracts with agents.<sup>117</sup>

The 2015 amendments also include language requiring many federal contractors and subcontractors to implement a human trafficking compliance plan.<sup>118</sup> A compliance plan is required for any portion of a contract with an estimated value in excess of \$500,000 for supplies acquired outside the United States or for services performed outside the United States.<sup>119</sup> While contractors furnishing commercially available off-the-shelf items (COTS items) are prohibited from engaging in the trafficking-related activities, COTS suppliers are exempt from the requirement to implement a formal compliance plan.<sup>120</sup>

When a compliance plan is required, it must be appropriate to the size and complexity of the contract, and to the nature and scope of the activities to be performed under the contract.<sup>121</sup> Factors to consider in developing an appropriate compliance plan include the number of non-United States citizens expected to be employed, and the risk that the contract or subcontract will involve services or supplies susceptible to human trafficking.<sup>122</sup>

Although the FAR gives contractors discretion in developing an appropriate compliance plan, it must meet certain minimum requirements.

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director, owner, employee, or agent to waive his or her attorney-client privilege or Fifth Amendment rights. FAR 52.222-50(g)(2).

115. FAR 52.222-50(d)(1). This language reflects a change from the 2006 requirements that “any information” be reported to the contracting officer only. *Combating Trafficking in Persons*, 71 Fed. Reg. 20,301 (Apr. 19, 2006) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

116. *Ending Trafficking in Persons*, 80 Fed. Reg. 4967, 4986 (Jan. 29, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52).

117. FAR 52.222-50(i). This provision requires subcontracts to include the flow-down requirement in FAR 52.222-50(i) as well. Thus, lower tier subcontracts must also include the substance of FAR 52.222-50.

118. *See* FAR 52.222-50(h).

119. *Id.*

120. *Id.*

121. FAR 52.222-50(h)(2).

122. *Id.*

First, it must include an awareness program.<sup>123</sup> Like the notification requirements described above, the awareness program must inform contractor employees of the government's policy prohibiting trafficking-related activities and the consequences for violating it.<sup>124</sup>

Second, the compliance plan must include a process for employees to report violations of the policy without fear of retaliation.<sup>125</sup> In that regard, the contractor must make the Global Human Trafficking Hotline telephone number and e-mail address available to employees.<sup>126</sup>

Third, the compliance plan must include a recruitment and wage plan that ensures that the contractor uses only recruitment companies with trained employees and does not charge recruitment fees to employees; and that ensures wages meet the minimum legal requirements of the country in which the work is taking place.<sup>127</sup>

Fourth, if the contractor or subcontractor provides or arranges for housing, the compliance plan must also include a housing plan to ensure that it meets the host country's housing and safety standards.<sup>128</sup>

Finally, the compliance plan is required to include procedures to prevent agents and subcontractors from engaging in human trafficking, and to monitor, detect, and terminate any agents or subcontractors who engage in those activities.<sup>129</sup>

If a compliance plan is required for the contract, the successful offeror, prior to the award of the contract, must certify that it has conducted "due diligence;" and that, "to the best of the offeror's knowledge and belief, neither it nor any of its agents, proposed subcontractors, or their agents, had engaged in any [prohibited activities];" or, if abuses have been found, "the offeror or proposed subcontractor has taken the appropriate remedial and referral actions."<sup>130</sup>

The regulation gives little guidance on what will be deemed appropriate due diligence prior to making the required certification. The FAR Council has said that the level of due diligence is a "business decision, requiring judgment by the contractor,"<sup>131</sup> but that they consider it the responsibility of the prime

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123. FAR 52.222-50(h)(3)(i).

124. *Id.*

125. FAR 52.222-50(h)(3)(ii).

126. *Id.* (referencing 1-844-888-FREE and help@befree.org).

127. FAR 52.222-50(h)(3)(iii).

128. FAR 52.222-50(h)(3)(iv).

129. FAR 52.222-50(h)(3)(v).

130. 48 C.F.R. § 22.1703(c)(1)(ii)(B) (2014).

131. Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4970 (Jan. 29, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52).

contractor to prevent subcontractors “at any tier” from engaging in human trafficking.<sup>132</sup>

A “subcontractor” in common parlance is “anyone who has a contract to furnish labor or material to the prime contractor.”<sup>133</sup> In other words, a subcontractor generally has some direct contractual relationship with the prime contractor. But the definition of “subcontractor” is far more expansive in the FAR. It is “any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor;”<sup>134</sup> and a “subcontract” is “any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.”<sup>135</sup>

The broad definitions of subcontract and subcontractor, together with uncertainties in what constitutes “performance of a contract,”<sup>136</sup> make uncertain the full scope of a contractor’s responsibility to implement a compliance plan and due diligence program that root out human trafficking in the supply chain. While it is obvious that the contractor must take adequate steps to determine whether materials incorporated into a finished product were produced in whole or in part through the use of forced labor, what is less obvious is whether a contractor must monitor production of goods used or consumed while performing a contract, but which are not part of the finished product or integral to the service provided. For example, the regulation does not answer the question as to whether a provider of security services working abroad must implement a compliance and due diligence program that will evaluate whether tires being purchased for vehicles are sourced through the use of forced labor on rubber plantations in Burma.<sup>137</sup>

Regardless, the State Department advises that companies conduct a basic mapping of their supply chains through to the sourced commodities.<sup>138</sup> That is, the company should take steps to identify actual or potential risks associated with labor contracting and sourcing of products, including referring to the Department of Labor’s “List of Goods Produced by Child Labor or Forced Labor” to determine whether the identified contractor or subcontractor utilized listed raw materials and commodities when it performed under the contract. The State Department also recommends companies expand their knowledge of

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132. *Id.* at 4976 (emphasis added).

133. *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 108 (1944).

134. FAR 52.222-50(a).

135. *Id.*

136. FAR 52.222-50(b).

137. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 114 (June 2014), <http://www.state.gov/documents/organization/226844.pdf> [<http://perma.cc/2KEJ-RD9V>].

138. Office to Monitor and Combat Trafficking in Persons, *The Challenges of Certification in Addressing Forced Labor*, U.S. DEP’T OF ST. 2 (June 2014), <http://www.state.gov/documents/organization/228265.pdf> [<http://perma.cc/B5CD-W6SA>].

and control over employee recruiting, and educate managers and employees about human trafficking and rights.<sup>139</sup> In response to comments elicited during the rulemaking process, the FAR Council indicated that, as part of a prime contractor's compliance plan, it may, "and in some cases should," require downstream suppliers to provide to the prime contractor all recruiting papers, signed recruiting and employment contracts, posters, training materials, and victim and witness statements.<sup>140</sup>

Failure to comply with the new regulations will result in an array of possible consequences. Among the consequences listed in the FAR itself are suspension or debarment, termination of the contract, and a host of intermediate actions, including requiring the contractor to remove one or more employees, requiring the contractor to terminate a subcontract, a suspension of payment under the contract pending remedial action, and loss of award fees.<sup>141</sup> But these remedies are not exclusive.<sup>142</sup> Contractors may also face a host of other consequences for failure to comply, including civil and criminal exposure, class action liability, whistleblower claims, False Claims Act liability, consumer complaints and boycotts, not to mention negative publicity and pressure from advocacy groups. In other words, the attack on the human trafficking problem will no longer fall solely on the backs of victims and law enforcement investigative agencies. The private sector now must do its part to stop the epidemic or face the consequences.

### III. STATE AND INTERNATIONAL EFFORTS TO ENFORCE STRICTER SUPPLY CHAIN MANAGEMENT

State laws regulating human trafficking are also becoming more prevalent. All fifty states and Washington, D.C. now have criminal laws prohibiting sex trafficking and forced labor.<sup>143</sup> Forty-two states have asset forfeiture statutes for trafficking crimes, and thirty-eight states have victim-witness programs.<sup>144</sup> Polaris, a non-profit dedicated to eradicating modern-day slavery, rates thirty-nine states in its "Tier 1" category, meaning the state has passed significant laws to combat human trafficking.<sup>145</sup>

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139. *Id.*

140. Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4982 (Jan. 29, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52).

141. FAR 52.222-50(e).

142. 48 C.F.R. § 22.1703 (2007) (stating that the remedies in FAR 52.222-50(e) are "in addition to any other remedies available to the United States Government.").

143. POLARIS, 2014 STATE RATINGS ON HUMAN TRAFFICKING LAWS (2014), <http://polarisproject.org/sites/default/files/2014-State-Ratings.pdf> [<http://perma.cc/SY7U-VGJM>].

144. *Id.*

145. *Id.* Polaris evaluates states for laws in ten categories, including whether the state has laws that (1) make sex trafficking a criminal offense; (2) make labor trafficking a criminal offense; (3) provide asset forfeiture for human trafficking; (4) require training for law

In practice, the law having the biggest impact on supply chain management is California's Senate Bill 657, the California Transparency in Supply Chains Act of 2010. Senate Bill 657 is a disclosure statute—its stated purpose is “to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, to improve the lives of victims of slavery and human trafficking.”<sup>146</sup> Thus, while it does not mandate that businesses implement measures to eradicate human trafficking from their supply chains, it does require the company to conspicuously disclose on its website the extent to which it (1) verifies its product supply chain to evaluate the risks of human trafficking; (2) audits suppliers to evaluate compliance with company standards regarding human trafficking; (3) requires direct suppliers to certify that materials comply with the laws regarding human trafficking in the country in which the supplier is doing business; (4) maintains internal accountability standards for employees and contractors who fail to meet company standards regarding human trafficking; and (5) provides training on human trafficking to individuals directly responsible for supply chain management.<sup>147</sup> The statute does not apply to all companies—it applies only to retailers and manufacturers that do business in California and have more than \$100 million in worldwide gross receipts<sup>148</sup>—but the California Franchise Tax Board estimates that 1,700 companies will have to comply.<sup>149</sup>

Internationally, on March 26, 2015, the United Kingdom Parliament enacted the Modern Slavery Act 2015.<sup>150</sup> In addition to consolidating existing criminal trafficking-related offenses, the law includes an additional provision similar to Senate Bill 657. Part 6 of the Act, “Transparency in supply chains etc.,” requires a business to make an annual disclosure on the company's website,<sup>151</sup> describing what steps the business organization has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains or in any part of its own business. Alternatively, the business must provide a statement that the organization has taken no steps to ensure that

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enforcement; (5) require a lower burden of proof for sex trafficking of minors; (6) require the posting of a human trafficking hotline; (7) protect sexually exploited minors; (8) provide victim assistance; (9) allow victims access to civil damages; and (10) permit human trafficking victims to have convictions for prostitution vacated. *Id.*

146. S. 657, 2010 Gen. Assemb., Reg. Sess. (Cal. 2010).

147. *Id.*

148. *Id.*

149. Kamala D. Harris, *The California Transparency in Supply Chains Act: A Resource Guide*, CAL. DEP'T OF JUST. 3 (2015), <http://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<http://perma.cc/5UJ2-C7NN>].

150. Modern Slavery Act, 2015, c.30 (U.K.), [http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga\\_20150030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf) [<http://perma.cc/PY32-SS3J>].

151. *Id.* at Part 6. Businesses without a website must provide a copy of the slavery and human trafficking statement to anyone who makes a written request, and must provide that copy within thirty days of the receipt of the written request. *Id.* at 54(8).

slavery and human trafficking are not taking place.<sup>152</sup> The disclosure requirement applies to commercial organizations with annual gross receipts of thirty-six million pounds per year (approximately fifty-six million dollars) that “supplies goods or services” in any part of the United Kingdom.<sup>153</sup> Unlike Senate Bill 657, the Modern Slavery Act applies to all business sectors, not just those involved in retail or manufacturing.

Neither Senate Bill 657 nor the Modern Slavery Act impose any substantive requirements other than disclosure, and the remedy for violating them is simply an action by the government for injunctive relief.<sup>154</sup> But that does not mean that these laws cannot be effective at changing corporate behavior. In what appears to be the first lawsuit of its kind, a California consumer class action was filed against Costco Wholesale Corporation in August 2015, alleging that Costco knowingly sold shrimp tainted by human slavery taking place in Thailand.<sup>155</sup> Senate Bill 657 and similar disclosure laws will no doubt cause similar consumer policing of supply chains of other corporations.

#### CONCLUSION

As the global problem of human trafficking expands, the government has responded in kind by enacting and reformulating laws specifically to address the unique problems of modern-day slavery. The 2015 amendments to the FAR, which require United States government contractors to actively root out human trafficking throughout their supply chains, coupled with state and international disclosure laws requiring companies to disclose to consumers what efforts (if any) they make in that regard, represents a substantial step forward in combating human trafficking. For some companies, these new disclosure laws and the FAR amendments are welcome opportunities to highlight what they are already doing to combat the \$150 billion illegal human trafficking industry. For others, the issue of human trafficking is a foreign one (or one that has simply been ignored). Their impact, while yet unknown, could

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152. *Id.*

153. *Id.*

154. S. 657, *supra* note 146; Modern Slavery Act, *supra* note 150, at 54(11). Though Senate Bill 657 has been in effect since 2012, the California Department of Justice only recently undertook a compliance review. In April 2015—just one month after the effective date of the FAR—it began notifying companies by letter that they must come into compliance or explain why they are not covered by the Act’s provisions. These letters have caused an uptick in the number of companies evaluating their supply chains.

155. Felicity Lawrence, *Costco and CP Foods Face Lawsuit Over Alleged Slavery in Prawn Supply Chain*, GUARDIAN (Aug. 19, 2015), <http://www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain> [<http://perma.cc/6Y97-P3XD>].

be significant as the companies required to come into compliance force their suppliers, both domestic and international, to clean up their acts as well.

